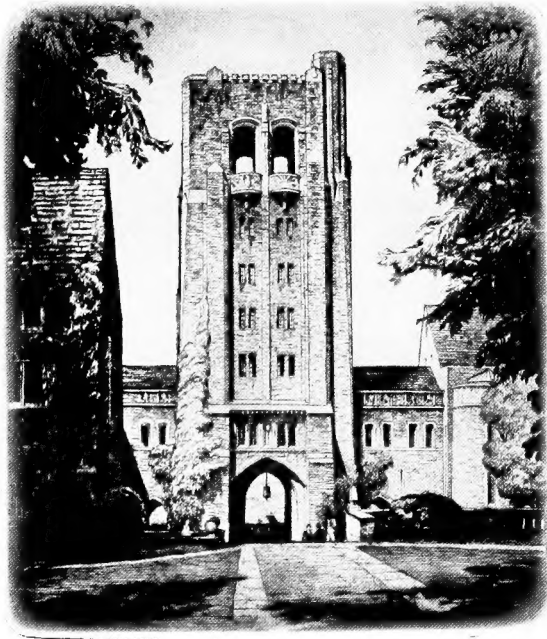




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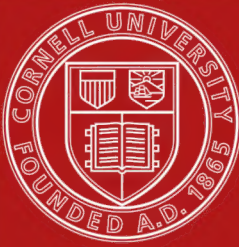
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A TREATISE
ON THE
BANKRUPTCY LAW
of the United States

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REMINGTON ON BANKRUPTCY

PART VIII.

CRIMES AND CONTEMPTS.

CHAPTER XLIII.

CRIMES AGAINST THE BANKRUPTCY ACT.

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§ 2316. Crimes against the Act.—In order to carry out the purposes of bankruptcy law, the Bankruptcy Act declares certain acts to be offenses and prescribes punishment for the committing of them. Perhaps in these offenses will be found what is left of the original criminal nature of bank-

ruptcy law as it was in the time of King Henry VIII and his successors.^a

The statute in § 29 declares the following offenses and their punishment:

"Offenses: (a) [**Trustee's misappropriation of property, etc., or secreting or destruction of document**] A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

(b) A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) [**Bankrupt's concealment of property**] concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) [**false oath**] made a false oath or account in, or in relation to any proceeding in bankruptcy; (3) [**presenting false claim**] presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) [**receiving property to defeat act**] received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act;¹ or (5) [**extortion**] extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

(c) A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) [**acting as referee when interested**] acted as a referee in a case in which he is directly or indirectly interested; or (2) [**purchasing assets while referee**] purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) [**refusing inspection of records**] refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

[**Prosecution to be within one year**] (d) A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

Thus, the perpetration of a fraudulent concealment is a punishable offense;² also the commission of a false oath.³

§ 2317. Section 29 Penal and to Be Strictly Construed.—Section 29 is a penal statute and must be strictly construed.

a. See ante, Introduction.

1. *Obiter*, B'd of Com'rs *Kans. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.).

2. *U. S. v. Levinson & Kornblut*, 13 A. B. R. 32 (D. C. S. C.); *U. S. v. Cohn*, 15 A. B. R. 357 (D. C. N. Y.); *Indictment for conspiracy to conceal*; *U. S. v. Lake*, 12 A. B. R. 270, 129 Fed. 499 (D. C. Ark.); *U. S. v. Marsh Chambers*, 13 A. B. R. 708, 135 Fed. 1023 (D. C. N. Y.); *Field v. U. S.*, 14 A. B. R. 507, 137 Fed. 6 (C. C. A. Ark.).

3. *United States v. Lowenstein*, 11 A. B. R. 134 (D. C. Pa.); *Bankrupt col-*

lecting money after bankruptcy and paying some creditors having honest debts; held not fraudulent concealment. *McNeil v. U. S.*, 18 A. B. R. 18, 150 Fed. 82 (C. C. A. Tex.).

3. *Bartlett v. U. S.*, 5 A. B. R. 678, 106 Fed. 884 (D. C. Mont.); *U. S. v. Lake*, 12 A. B. R. 270, 129 Fed. 499 (D. C. Ark.).

As to duty to report offenses arising in the course of the proceedings to the district attorney, see *In re Simon & Sternburg*, 18 A. B. R. 204, 151 Fed. 507 (D. C. Ga.).

Field *v. U. S.*, 14 A. B. R. 507, 137 Fed. 6 (C. C. A. Ark.): "A penal statute which creates and denounces a new offense must be strictly construed. Where it is plain and unambiguous, the courts may not lawfully extend it by interpretation to a class of persons who are excluded from its effect by its terms for the reason that their act may be as mischievous as those of the class whose deeds it denounces."

§ 2318. Acts Committed before Bankruptcy Not within Statute.

—The provisions of the act do not make any act of the bankrupt before the bankruptcy criminal.⁴

In *re Stead & Curtis*, 6 A. B. R. 75, 107 Fed. 682 (D. C. N. Car.): "* * * The acts made criminal under the Act are acts after the adjudication."

§ 2319. Continuing Concealment.—But concealment from the trustee is perpetrated—continuing concealment—by the bankrupt's failure to reveal recoverable property, when the duty exists for him to reveal it, after bankruptcy, although the initial acts of fraud or secreting occurred before the bankruptcy.⁵

United States v. Stern, 26 A. B. R. 110, 186 Fed. 854 (D. C. Pa.): "The government proceeded upon the theory that the conspiracy and concealment continued, and that after the election of the trustee, a refusal to produce the property upon demand was a continuance of the concealment as of the date charged, and an overt act in the continuance of the conspiracy, which warranted the government in charging the conspiracy as of the same date. * * * Sufficient to say, that the government's contention that the conspiracy was an offense which was continued and properly charged in the indictment as of the date mentioned is, in the judgment of the court, correct and supported by numerous authorities, the most recent of which is *United States v. Kessel*, 218 U. S. 601. * * * A failure to deliver over to him [trustee] upon demand any property or cash which the bankrupt may have in his possession, is an offense as of any date the concealment continues."

Stern v. United States, 28 A. B. R. 101, 193 Fed. 888 (C. C. A. Pa.): "That this money unaccounted for was concealed from the trustee after the bankruptcy, depends upon the evidence that the said defendants, upon their examination and demand made by the trustee therefor, denied that it was in their possession and failed to give any account of the same. Taken with all the other evidence in the case, we think that this evidence was competent and sufficient to justify the jury in finding the fact of concealment after the bankruptcy."

4. *U. S. v. Cohn*, 15 A. B. R. 357, 142 Fed. 983 (D. C. N. Y.).

Thus, it has been held that an indictment for conspiracy to conceal assets of a bankrupt estate, which shows that the conspiracy was entered into and the assets removed and concealed prior to the bankruptcy, but which does not allege that said acts were done in contemplation of bankruptcy nor that any overt act was committed after the bankruptcy, does not state an offense under U. S. Rev. Stat. 5440, though a further conspiracy to con-

tinue to conceal the concealed property is alleged. *United States v. Grodson*, 21 A. B. R. 68, 164 Fed. 157 (D. C. Ills.). But compare post, § 2320½; also, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.). Also, compare, *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

5. *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.), quoted post at § 2320½; *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

United States v. Cohn, 15 A. B. R. 357, 142 Fed. 983 (D. C. N. Y.): "This provision of the Bankrupt Act does not make any act of the bankrupt before the bankruptcy criminal. But if a bankrupt, before the bankruptcy, has concealed his property, and, after his trustee is appointed continues to conceal it from the trustee, he is criminally liable under this section, and, if indicted for such crime, evidence of his acts of concealment before the bankruptcy, as well as those subsequent thereto, would undoubtedly be admissible as part of the *res gestæ*. A conspiracy to commit a crime always, in the nature of the case, precedes the commission of the crime; and, in my opinion, it does not follow, because, at the time that a conspiracy is entered into to conceal property from a trustee, no trustee has been appointed and no proceedings in bankruptcy begun, that, therefore, the crime of conspiracy under § 5440 cannot have occurred."

And evidence of acts of concealment before the bankruptcy, as well as those subsequent thereto, are admissible as part of the *res gestæ*.⁶

A continuing concealment from the trustee is properly charged as of any date when the trustee demands the property and it is not forthcoming.⁷

The fact that a concealment continues to be such in so far as the result of it is concerned, does not, however, make it a continuous one so as to preclude a defense based on the statute of limitations.

United States v. Phillips, 27 A. B. R. 625, 196 Fed. 574 (D. C. N. Y.): "The government, by proving that a bankrupt many years ago secreted some articles of property from his trustee, which fact the trustee knew or had good cause to believe, and for which property demand has duly been made, thereby raises the presumption (apparently irrebuttable) that the crime had continued and would continue as long as the criminal lived and did not surrender. This is exactly the situation painted with disapproval in the *Irvine* case (page 452), and to look upon the facts otherwise is to overrule and disregard statutes of limitation generally. If Phillips can be successfully prosecuted under this indictment, every living bankrupt who has been suspected of concealing property can at any time be indicted therefor. I do not so read the act."

And the limitation of time within which the offender must be prosecuted begins to run from the time the overt act of the offense was committed.⁸

Warren v. United States, 29 A. B. R. 555, 199 Fed. 753 (C. C. A. La.): "The contention of the defendant is that the record, without dispute, shows that the date of the indictment—December 18, 1909—was more than twelve months 'after the commission of the offense,' if any offense was committed, because all of the acts of the defendant in reference to the property were performed more than twelve months before the indictment. The United States attorneys, in the forcible argument presented for the government, contend that the offense charged is a continuing offense, and that the statute of limitations does not begin to run until the termination of the concealment 'or until the bankrupt has abandoned his effort to conceal the property;' that as long as he 'fails to notify the trustee of the whereabouts of the property, the concealment continues, and there is no statute of limitations to prevent the prosecutions.' The correctness of this contention must be judged in connection with the facts disclosed by the record.

6. *United States v. Cohn*, 15 A. B. R. 357, 142 Fed. 983 (D. C. N. Y.).

7. *United States v. Stern*, 26 A. B.

R. 110, 186 Fed. 854 (D. C. Pa.), quoted at § 2319.

8. See post, § 2329½, "Statute of Limitations."

The defendant made no 'efforts'—that is, did nothing—to conceal the property within twelve months before the indictment. The acts proved, relied on as concealment, were all of date more than twelve months before the indictment. The government's contention, therefore, must fall, unless the mere silence and passivity of the defendant after the alleged concealment makes the crime a continuing one, so that, to quote the brief, 'there is no statute of limitations to prevent the prosecution.' We cannot concede that such is the case. The government, to avoid the statute, should have begun the prosecution within twelve months after the commission of the acts constituting the offense.

"If the contention of the government were correct, the statute of one year, while in terms it is made to apply to cases of concealing assets, would in practice seldom have any application. Twenty years after the appointment of the trustee the bankrupt could be prosecuted for concealing assets, and the government could prove that he had purchased certain goods shortly before the bankruptcy, that such goods were not surrendered, and then, by proof of some circumstances from which the jury might determine that there had been concealment, have a case sufficient to go to the jury. Twenty years having elapsed, the defendant's witnesses might be gone or dead, and even his own memory might fail him in making a satisfactory explanation. When the trustee is appointed, he has title to the assets and should take possession. The creditors are interested that he should do so. The schedules show what property is surrendered by the bankrupt. If it is to be claimed that he has fraudulently and knowingly concealed a part of his estate, in fairness to the bankrupt the charge should be brought within twelve months after the unlawful act. The statute plainly so reads. Ordinarily, and in his case, there is no reason why the prosecution could not have been begun within the year.

"It is true that there may in some cases be difficulty in showing when the act or series of acts occurred which made the crime complete; but when the property is knowingly and fraudulently concealed from the trustee—a fact that may be proved like any other fact—the bankrupt is liable to prosecution and the statute of limitations begins to run. In other words, it runs from the time of the commission of the offense."

§ 2320. Concealment before Appointment of Trustee.—It has been held, in an obiter, that the offense of concealment of assets from a trustee may be committed before the appointment of a trustee, if after adjudication.

Obiter, *United States v. Goldstein*, 12 A. B. R. 755, 132 Fed. 789 (D. C. Va.): "It is true that clause 1 applies to concealing property from the trustee, and that in the case at bar the alleged concealment was prior to the appointment of the trustee. But when a person files his voluntary petition in bankruptcy, he knows that a trustee will be appointed, and that such trustee takes title as of the date of the adjudication. It follows that a concealment of property after the adjudication, even if before the appointment of the trustee, is a concealment from the trustee."

But this is doubtful law; for the concealment must be concealment from the trustee.⁹

Nevertheless, if concealment before the appointment of a trustee continues after his appointment, it constitutes concealment from him.

9. In re Adams, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.).

Cohen v. United States, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.): "We think, however, that the indictment is not so limited in scope as claimed by the defendants. It is true that it charges the removal and concealment of certain property before the appointment of a trustee, but it further alleges that a trustee was subsequently appointed and that the property was never turned over to him, but was concealed from him by the procurement of defendant Simpson with the knowledge, consent and connivance of the other conspirators. The case presented by the indictment is therefore one of continued concealment, and we are not called upon to consider whether there is an omission in the Bankrupt Law in respect of the disposition of property in contemplation of bankruptcy. If a bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment he violates the Bankrupt Act, and a conspiracy that he shall do so violates the conspiracy statute."

§ 2320½. **Adjudication of Bankruptcy Essential.**—It is essential, where any of the offenses expressly mentioned in the act are charged, to prove adjudication of bankruptcy.

Gilbertson v. United States, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.): "Without adjudication as a bankrupt within the meaning of the statute, the conviction cannot be upheld, notwithstanding the proof of flagrant concealment of property from the trustee (*de facto*), and the single inquiry for solution is the legal effect of the bankruptcy record in evidence—whether it is conclusive in the case at bar of such adjudication."

§ 2320¼. **Conspiracy to Commit Offense against the Bankruptcy Act.**—A conspiracy to commit an offense against the Bankruptcy Act is, however, itself a crime, though it be not specifically mentioned as such in the Bankruptcy Act. Such a conspiracy is cognizable as an offense under § 5440 of the Revised Statutes of the United States.¹⁰

Thus, there may be a conspiracy to commit a false oath in a bankruptcy proceedings; as, for example, a conspiracy among the officers of a bankrupt corporation to commit a false oath in bankruptcy proceedings.¹¹

And such conspiracy is none the less punishable because of having been entered into prior to the appointment of a trustee, or even prior to the bankruptcy.¹²

10. *Radin v. United States*, 25 A. B. R. 649, 189 Fed. 568 (C. C. A. N. Y.); *United States v. Stern*, 26 A. B. R. 110, 186 Fed. 854 (D. C. Pa.), quoted on other points at § 2319.

11. See § 2320¾.

12. *Radin v. United States*, 25 A. B. R. 640, 189 Fed. 568 (C. C. A. N. Y.); quoted at § 2321; *United States v. Comstock*, 20 A. B. R. 525, 526, 161 Fed. 644 (D. C. R. I.); *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y., affirming 15 A. B. R. 357). Compare pleadings in civil action for conspiracy to defraud creditors. *Strasburger v. Bach*, 19 A. B. R. 732, 157 Fed. 918 (C. C. A. Ills.).

Evidence: Admissions, *Alkon v.*

United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.); *U. S. v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

No receiving of admissions of alleged conspirators before independent proof of a conspiracy. *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.): "But it is urged that the evidence of Simpson's declarations was received before there was any proof of the conspiracy, and it is claimed that declarations of an alleged conspirator are not admissible to prove the existence of a conspiracy. We are not disposed to question this last claim. But we are of the opinion that there was proof of the conspiracy

And there may be a conspiracy to commit an offense against the Bankruptcy Act, though the defendant be not, strictly speaking, a bankrupt.¹³

Cohen v. United States, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.): "The corporation—the bankrupt—could violate the provision against fraudulently concealing assets. Its acts would be criminal notwithstanding its corporate character would prevent its punishment. Even if the corporation alone could violate the Bankruptcy Act, the defendants could conspire that the corporation should violate it and so be guilty of conspiracy. Although a bankrupt alone can be indicted for violating the Bankruptcy Act, persons combining with him to violate it may be guilty of conspiracy. *United States v. Bayer*, 4 Dill. 407. It is immaterial that the corporation was not indicted for conspiracy or whether it could be indicted. Failure to prosecute all conspirators does not prevent the prosecution of a part of them. *United States v. Miller*, 3 Hughes, 553; *People v. Richards*, 67 Cal. 412; *People v. Mather*, 4 Wend. 229. That a corporation may be a conspirator see *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun 153, 106 N. Y. 607; *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545; *West Va. Trans. Co. v. Standard Oil Co.*, 50 W. Va. 611."

The indictment must, of course, charge the crime effectively.

United States v. Waldman, 26 A. B. R. 677, 188 Fed. 524 (C. C. N. Y.): "There is no allegation in this indictment that any of the defendants were officers of or connected in any way with the corporation of S. Fineman Company. The allegation is, in substance, that the defendants conspired together to have the bankrupt conceal from its trustee, when he was appointed, its property. By § 29b of the Bankrupt Act it is made a criminal offense for a person to have knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. The Bankruptcy Act does not make it a criminal offense for a person who is not a bankrupt to conceal the bankrupt's property from the trustee. The charge, therefore, in this case is that persons who were not the bankrupt, and who are not alleged to have been connected in any way with the bankrupt, or to sustain any such relation to the bankrupt as to confer upon them any authority over the bankrupt, conspired to have the bankrupt conceal its property; but presumably they had no power to carry out the object of the conspiracy. They were not the bankrupt, or officers of the bankrupt. They might conspire as much as they chose, but there is nothing to indicate that they could thereby compel or induce the bankrupt to conceal its property, and there can be no presumption that a bankrupt would commit a crime simply because outside parties

in this case other than Simpson's declarations, and the mere fact that all the evidence thereof was not in at the time the declarations were testified to did not render it erroneous to receive them. It was a question of the order of proof and within the discretion of the trial court."

Bankrupt's account books not privileged; bankrupt's books of account, taken possession of by the receiver in bankruptcy, are admissible on proof of conspiracy, notwithstanding claim of privilege under § 860, U. S. Rev. Stat. *Kerrch v. United States*, 22

A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Customary course of business in common carrier's office as proof of receipt of goods by bankrupt, competent. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Proving identity of goods by similarity of invoices. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

13. Inferentially, *United States v. Waldman*, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.).

conspired to have it done. If the indictment alleged that the defendants conspired with the officers of the bankrupt, or with stockholders or any persons able to influence the officers of the bankrupt, a different question would be presented."

Where the charge is that of a conspiracy to conceal assets, the proof is necessarily based largely on circumstantial evidence.

Radin v. United States, 25 A. B. R. 640, 189 Fed. 568 (C. C. A. N. Y.): "The evidence was largely presumptive. The agreement was not reduced to writing and signed by the conspirators. It was not proved by direct oral evidence. From the nature of the case such proof was impossible. Conspiracies are not formed in that way. Conspirators do not go out upon the public highways and proclaim their intention. They accomplish their purpose by dark and sinister methods and must be judged by their acts.

"If the proof shows a previous meeting and a concert of action thereafter, each of the parties doing some act contributing to accomplish an unlawful purpose, a jury is justified in finding that they were conspiring together to accomplish that purpose."

§ 2320½. Conspiracy to Conceal in Contemplated Bankruptcy.—But conspiracy to conceal in a bankruptcy contemplated in the future may be committed before adjudication.¹⁴

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.): "The first proposition is that the indictment alleged no offense because there was no existing bankruptcy when the conspiracy originated, while the statute—§ 29 of the Bankruptcy Act of 1898 * * *—punishes only concealment of goods 'while a bankrupt,' and it is said that, as the alleged conspiracy related only to the doing of something which was not illegal when the conspiracy originated, the statute under which the indictment was found did not apply. That result would follow if the proposition as to the extent of the conspiracy was true; but it included an intent to continue the concealment until after Barish became a bankrupt, and it was like all conspiracies in that it related to something in futuro."

Stern v. United States, 28 A. B. R. 101, 193 Fed. 888 (C. C. A. Pa.): "That this money thus unaccounted for was concealed from the trustee after the bankruptcy, depends upon the evidence that the said defendants, upon their examination and demand made by the trustee therefor, denied that it was in their possession and failed to give any account of the same. Taken with all the other evidence in the case, we think that this evidence was competent and sufficient to justify the jury in finding the fact of concealment after the bankruptcy. * * * The charge of conspiracy in the second indictment rested upon the same evidence. The defendants were all members of the same firm, were all cognizant of its business, and all failed to account for the incriminating circumstances to which we have above referred. Whenever begun, this conspiracy may well have been found to have continued until the 9th day of June, or after the examination of the defendant."

And it has been held that it is not necessary to allege or prove that a

14. *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); *obiter*, *Kerrch v. United*

States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

trustee had been appointed where the indictment is brought under § 5440 of the United States Revised Statutes.

Radin v. United States, 25 A. B. R. 640, 189 Fed. 568 (C. C. A. N. Y.): "Of course, this conspiracy may be entered into prior to the bankruptcy; to hold otherwise would emasculate the statute and render it abortive in its application to the bankruptcy act. After the bankrupt's property is in the hands of the court it would be well nigh impossible to carry out such a conspiracy as is here shown." [Quoted further at § 2321.]

§ 2320 $\frac{3}{4}$. Conspiracy to Commit False Oaths.—There can be a conspiracy to commit false oaths in a bankruptcy proceedings.

Obiter, *United States v. Waldman*, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.): "The second count charges the conspiracy to give false oaths in a bankruptcy proceeding. This is an offense if committed by a person other than the bankrupt. [As well as if committed by the bankrupt.]"

§ 2321. Indictment to Be Specific and to Contain All Essential Elements.—The indictment must be specific and must contain all the essential elements of the offense.¹⁵

Obiter, *McNeil v. United States*, 18 A. B. R. 22, 150 Fed. 82 (C. C. A. Tex.): "To support this contention counsel rely on *United States v. Carl*, 105 U. S. 611, to the effect that in an indictment upon the statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. The *Carl* Case has been followed by the Supreme Court in many cases. See *United States v. Hess*, 124 U. S. 483; *Evans v. United States*, 153 U. S. 584; and *Keck v. United States*, 172 U. S. 434, all to the effect that all the ingredients of the offense are to be charged in the indictment, although the statute in its general or special description has omitted some of them."

Thus, as to the materiality of the false oath—no allegation of the materiality is required, where the facts pleaded sufficiently show of themselves the materiality.¹⁶

Where the act charged is that of conspiracy to commit a false oath in a bankruptcy proceedings, such false oath must be specified.

United States v. Waldman, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.): "The second count charges a conspiracy to give false oaths in the bankruptcy

15. *Bartlett v. United States*, 5 A. B. R. 678, 105 Fed. 884 (C. C. A. Mont.), a case of false oath; *United States v. Waldman*, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.).

Compare, *Kovoloff v. United States*, 28 A. B. R. 767, 202 Fed. 475 (C. C. A. Ills.); compare, *United States v.*

Freed, 25 A. B. R. 89, 179 Fed. 236 (D. C. N. Y.).

"**Secrete**" and "**Conceal**" **Synonymous Terms.**—*United States v. Phillips*, 27 A. B. R. 625, 196 Fed. 574 (D. C. N. Y.).

16. *United States v. Lake*, 12 A. B. R. 270, 129 Fed. 499 (D. C. Ark.).

proceedings. This is an offense if committed by persons other than the bankrupt. But the trouble with the second count is that it does not state what false oaths were to be given, or what the subject of the false oaths was, with any such reasonable particularity as would apprise the defendants of the nature of the charge against them. Without requiring extreme detail in the allegations, it is not enough to allege that the defendants conspired to give false oaths, which is, in substance, all that the second count alleges."

Thus, also, as to the description of the property. An indictment against the president of a bankrupt corporation for making a false oath to its schedules may describe the assets charged to have been knowingly and fraudulently omitted from the schedules as "one hundred and fifty thousand dollars in lawful money of the United States."¹⁷

The averments of the indictment must not be made argumentatively, but directly.¹⁸

It is unnecessary to specify the particular manner of "concealment," whether it be by "secreting," "falsifying" or "mutilating," nor to set forth the evidence.¹⁹

United States v. Comstock, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.): "The argument is that as the statute says that the word 'conceal' shall include 'secrete, falsify, and mutilate,' three acts widely different in their nature, the indictment should define which one of these acts is intended. The decisions of the Supreme Court as to the words 'wilfully misapply' in the laws relating to national banks do not seem to be applicable. As the words 'wilfully misapply' in the statute did not set forth all the necessary elements of the offense, it was considered not sufficient to charge the offense in the words of the statute. Under the statute now in question, the mode of concealment is entirely immaterial. The word 'fraudulently' limits the word 'conceal,' and supplies the element of criminality which was not contained in the words 'wilfully misapply,' which were not limited by express terms, but by construction of the statute in view of the subject-matter. It was necessary, therefore, that this limitation arrived at by construction should be set forth in the indictment in specific terms; for otherwise the terms of the indictment addressed to a defendant, informing him of the nature of the act with which he is charged, would be broader than the true import of the statute. By this indictment the defendant is charged with fraudulent concealment of goods, and is given due notice that evidence may be offered against him of various modes of concealment. To require the government to specify a particular mode of concealment would unnecessarily limit it to a particular mode, and deprive it of the right to introduce evidence that all the modes of concealment—the actual hiding of goods, hiding of books, accounts or documentary evidence by secreting or mutilating the same, etc.—were used. It is unnecessary to set forth the evidence upon which the government relies, and the defendant, as in ordinary cases, must take notice that any testimony relevant to the question of fraudulent concealment may be introduced against him."

No allegation of ownership is essential other than that the property was

17. *United States v. Lake*, 12 A. B. R. 270, 129 Fed. 499 (D. C. Ark.).

18. *Bartlett v. United States*, 5 A. B. R. 678, 105 Fed. 884 (C. C. A. Mont.).

19. But compare, *United States v. Waldman*, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.).

"belonging to his estate in bankruptcy." ²⁰

Nor is it necessary to allege that the bankrupt knew of the appointment of a trustee of his estate.²¹

The allegation that the trustee was "duly" appointed and qualified is sufficient, at least on review.²²

Where the act charged is a conspiracy to conceal assets in contemplation of subsequent bankruptcy, it has been held that the appointment of a trustee need not be alleged.

Radin v. United States, 25 A. B. R. 640, 189 Fed. 568 (C. C. A. N. Y.): This court has held that the statute applies to a conspiracy formed in contemplation of bankruptcy (*Cohen v. U. S.*, 19 A. B. R. 8, 157 Fed. 651; see also, *Alkon v. U. S.*, 22 A. B. R. 489, 163 Fed. 810). An indictment charging such a conspiracy does not and cannot contain an averment that a trustee was appointed when none has been appointed. It is a familiar rule that the pleadings must conform to the facts and the proof to the pleadings. If the appointment of a trustee be an essential ingredient of the offense it is necessary to allege it, and this is impossible where none has been appointed. If, on the other hand, a trustee be subsequently appointed, proof of the fact might successfully be prevented on the ground that nothing of the kind is alleged. What, then, is to be done with a case where the proof shows that a conspiracy was formed before bankruptcy, but in contemplation thereof, and its members were so successful in doing acts to effect the object of the conspiracy that nothing of the banker's estate is left for his creditors?

"No reason exists for a trustee in such circumstances. He might be appointed, it is true, but it would be a vain act; as well might an administrator be appointed for a deceased person who has left nothing but debts. From a practical viewpoint the existence of the trustees in no way affects the guilt or innocence of the conspirators. His appointment is not an ingredient of the crime which relates to a conspiracy to conceal the goods so effectually that no trustee will ever be needed. * * * We are, however, of the opinion that it was not essential in the case at bar the indictment should allege or the proof show that a trustee was actually appointed."

§ 2322. Indictment for "False Oath" or "Concealment of Assets" to Aver Falsity and Scienter.—The indictment for a false oath must aver not only knowledge of the falsity but also must directly aver the falsity itself.²³

And the indictment for concealment of assets is fatally defective if it fail to characterize the concealment as having been done "knowingly and fraudulently," in the very words themselves or equivalent words.²⁴ So also

²⁰. *United States v. Comstock*, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.).

²¹. *United States v. Comstock*, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.).

²². *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

²³. *Bartlett v. United States*, 5 A. B. R. 678, 105 Fed. 884 (C. C. A. Mont.). Compare, as to when scienter sufficiently averred, *McNiell v. United State*, 18 A. B. R. 21, 150 Fed. 82 (C.

A. Tex.). Compare, *United States v. Freed*, 25 A. B. R. 89, 179 Fed. 236 (D. C. N. Y.). Instance of sufficient allegation of falsity. *Daniels v. United States*, 27 A. B. R. 790, 196 Fed. 459 (C. C. A. Ohio). However, compare, *Kovoloff v. United States*, 28 A. B. R. 767, 202 Fed. 475 (C. C. A. Ill.).

²⁴. *United States v. Comstock*, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.).

with an indictment for conspiracy to conceal.

United States v. Comstock, 20 A. B. R. 525, 161 Fed. 644 (D. C. R. I.): "The words 'knowingly and fraudulently' are an essential part of the statute, and describe an essential ingredient of the offense. The omission of these words, or any equivalent, is in my opinion, fatal on demurrer."

It need not be alleged to have been done "willfully," however, the word "conceal" itself plainly excluding unintentional acts.

United States v. Comstock, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.): "The indictment uses the words 'unlawfully, knowingly and fraudulently' to characterize the word 'conceal.' Upon demurrer, it is contended that no wrongful intent is sufficiently charged by these words. The terms of the statute, however, are themselves inconsistent with an honest or lawful purpose, and set forth all the elements of the offense. In such case it is sufficient to charge the offense in the terms of the statute. The defendant assigns as cause of demurrer the omission of the word 'willfully.' The language of the statute used in the indictment is the substantial equivalent of a charge that the defendant did wilfully conceal. *Bullis v. O'Beirne*, 195 U. S. 606-617, 13 Am. B. R. 108. * * * The term 'conceal,' itself a word of plain interpretation (*United States v. 350 Chests of Tea, 12 Wheat*. 493, 6 L. Ed. 702), when coupled with the words 'unlawfully, knowingly, and fraudulently,' plainly excludes unintentional acts. The word 'conceal' according to Bankruptcy Act, § 1 (22) shall include 'secrete, falsify, and mutilate.'"

§ 2323. Schedules of Bankrupt Used in Criminal Proceedings.—Under the protection of U. S. Rev. Stat., § 860, it was forbidden to use the schedules in any criminal proceedings against the bankrupt.²⁵

However, since the repeal of this statute²⁶ and inasmuch as the United

^{25.} *Jacobs v. United States*, 20 A. B. R. 550, 161 Fed. 694 (C. C. A.); *Johnson v. United States*, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.); *Cohen v. United States*, 22 A. B. R. 333, 170 Fed. 715 (C. C. A. S. C.). Compare, *Johnson v. United States*, 22 A. B. R. 359, 170 Fed. 581 (C. C. A. Mass.).

^{26.} Congress in 1910 repealed § 860 of the Revised Statutes of the United States, which section is frequently involved in the discussions as to the immunity of the bankrupt from the use of his schedules, testimony, etc., given in bankruptcy proceedings. See Report of Senate Judiciary Committee No. 502, 61st Congress, Second Session: "Section 860, which the bill proposes to repeal, reads as follows: 'No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, That this section shall not

exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.' This section was enacted apparently for the purpose of enabling the government to compel the disclosure of incriminating testimony on condition that the witness disclosing the same would be given immunity. In the case of *Counselman v. Hitchcock* (142 U. S. 547) it was held that legislation can not abridge a constitutional privilege, and that it can not replace or supply one, at least unless it is so broad as to have the same extent in scope and effect, and that said § 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition, and that in view of the constitutional provision (article 5 of the amendments) a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which the question relates."

"Since the decision above referred to § 860 has possessed no usefulness what-

States Supreme Court has held that § 7 (9) does not protect the bankrupt from the use of his schedules, books, documents, etc., these may now be used against him in a criminal prosecution.²⁷

Ensign v. Commonwealth of Pennsylvania, 227 U. S. 592, 30 A. B. R. 408: "The reliance of the plaintiffs in error, of course, is upon that part of clause 9 of the section which declares: 'but no testimony given by him shall be offered in evidence against him in any criminal proceeding.'

"It is insisted that, in accordance with the spirit of the Fifth Amendment, this should be construed as applying to the schedule required to be prepared, sworn to, and filed by the bankrupt under the provisions of the 8th clause. But as a matter of mere interpretation, we deem it clear that it is only the testimony given upon the examination of the bankrupt under clause 9 that is prohibited from being offered in evidence against him in criminal proceeding. The schedule referred to in the 8th clause, and the oath of the bankrupt verifying it, are to be 'filed in court' and, therefore, are, of course, to be in writing. The word 'testimony' more properly refers to oral evidence. It was reasonable for Congress to make a distinction between the schedule, which may presumably be prepared at leisure and scrutinized by the bankrupt with care before he verifies it, and the testimony that he is to give when he submits to an examination at a meeting of creditors or at other times pursuant to the order of the court—a proceeding more or less unfriendly and inquisitorial, as well as summary, and in which it may be presumed that even an honest bankrupt might, through confusion or want of caution, be betrayed into making admissions that he would not deliberately make. Full effect can be given to the cause, 'but no testimony given by him shall be offered in evidence against him in any criminal proceeding,' by confining it to the testimony given under clause 9, to which the words in question are immediately subjoined. And, we think that proper interpretation requires their effect to be thus limited."

ever, but has remained in the law as an impediment to the course of justice. Under it a witness can not be compelled to give any incriminating testimony whatever, but if he chooses to go on the witness stand and testify as to any matter whatever, even of his own volition, and, whether incriminatory or not, his testimony can not thereafter be brought up against him in any criminal proceedings. He can not be confronted with his own testimony or his own previous statement under oath even on cross-examination. The statute has become a shield to the criminal and an obstruction to justice. The bill has the approval of the Attorney-General, as will appear by a quotation from pages 22 and 23 of his annual report for the year 1909, which reads as follows: 'In the enactment of this section it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of *Counselman v. Hitchcock* (142 U. S. 547), held that this section

was no substitute for the constitutional guaranty against self-crimination. As a result it is availed of constantly by criminals to prevent the government from using against them any testimony given by them at any time in any proceeding. So far as I am aware no statute in any of the States protects a man who is charged with a crime from having used against him in a criminal proceeding testimony given by him in a civil suit. The United States attorney for the southern district of New York informs me that it is an everyday occurrence in bankruptcy cases for bankrupts and their witnesses to testify before special examiners, referees, etc., often falsely, and then, when indicted for some offense under the Bankruptcy Act, to appear in court and testify in direct contradiction of what they may have deposed in the proceedings before the referee or examiner; but the government is prevented by the above-quoted section from using such testimony against them."

²⁷. See ante, § 1556, et seq.

§ 2324. Immunity from Use of Bankrupt's Testimony.—No testimony given by the bankrupt may be offered in evidence against him in any criminal proceedings.^{28*} Nor can such immunity be evaded by reading from the record of the testimony²⁹ even though on cross examination of a bankrupt who had voluntarily offered himself as a witness.³⁰ And, in general, indirect methods of getting the bankrupt's examination into evidence are forbidden.³¹

The immunity afforded by § 7 (9), however, is confined solely to the "testimony" given upon the examination authorized by this subdivision of § 7, and does not include immunity from the use of his schedules, books, documents, etc.³²

Ensign v. Commonwealth of Pa., 227 U. S. 592, 30 A. B. R. 406: "For the reasons given, it seems to us clear that the plaintiffs in error were not entitled to have the bankruptcy schedules excluded from evidence, because those schedules were not within the description of 'testimony' in the clause quoted from section 7 of the Bankruptcy Act.

"And for like reasons, the evidence showing the results of an expert examination of the books of the bankers was also admissible. This conclusion renders it unnecessary for us to consider whether the prohibition with which we have dealt, that 'no testimony given by him shall be offered in evidence against him in any criminal proceeding' is not limited to criminal proceedings in the Federal courts; and upon this question we express no opinion."

For a long time it was doubted whether the statutory immunity of § 7 (9) from the use as evidence in any criminal proceedings of the bankrupt's testimony before the referee was not an effective obstacle to any conviction for swearing falsely before the referee, some courts holding the provision was inclusive and covered immunity from the prosecution for falseness of the testimony itself, while other courts held that immunity extended simply to prosecution for any actual crime revealed by the testimony.³³

However, the matter has been definitely set at rest by the Supreme Court of the United States, to the effect that the immunity afforded by § 7 (9) is not applicable to a prosecution for perjury committed by the bankrupt when examined under it.³⁴

Glickstein v. United States, 222 U. S. 139, 27 A. B. R. 786: "When the legality of a conviction and sentence of Glickstein was before the court below, as the

²⁸. Bankr. Act, § 7 (9): "No testimony given by the bankrupt shall be offered in evidence against him in any criminal proceedings." See ante, § 1556, et seq.

Trustee testifying never learned whereabouts of assets from bankrupt but discovered them without bankrupt's assistance. *Johnson v. U. S.*, 22 A. B. R. 359, 170 Fed. 581 (C. C. A. Mass.).

²⁹. *Jacobs v. United States*, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

³⁰. *Jacobs v. United States*, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

³¹. *Jacobs v. United States*, 20 A. B. R. 550, 161 Fed. 694 (C. C. A.); *obiter*, *Johnson v. United States*, 22 A. B. R. 359, 170 Fed. 581 (C. C. A. Mass.); compare, to same effect as to witness, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

³². See ante, § 1556; a fortiori, *Kerrich v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

³³. See ante, §§ 1556 and 1556½.

³⁴. *Wechsler v. United States*, 19 A. B. R. 1, 158 Fed. 579 (C. C. A. N. Y.); *In re Kaplan Bros.*, 32 A. B. R. 305, — Fed. — (C. C. A. Pa.).

result of error prosecuted by him, the court, stating the facts which we have recited, certified the following question: 'Is subsec. 9 and the immunity afforded by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?'

"With these propositions in hand, it follows that the precise question for decision is, Did the guaranty of immunity contained in the 9th subdivision of § 7 of the Bankruptcy Act bar a prosecution for perjury for false swearing in giving testimony under the command of the section? In other words, the sole question is, Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution? The argument to maintain that it does is that, as the statute provides for immunity, and does not contain the reservation found in either Rev. Stat., § 860, or that embodied in the Act of 1893, therefore, under the rule that the inclusion of one is the exclusion of the other, such reservation can not be implied. Or, to state the proposition in another form, it is that as the statute in the immunity clause says: 'But no testimony given by him (the witness who is compelled to be examined) shall be offered in evidence against him in any criminal proceeding,' and as these words are unambiguous, there is no room for limiting the language so as to cause the immunity provision not to prohibit the offer of the testimony in a criminal prosecution for perjury. But the contention assumes the question for decision, since it excludes the possibility of construction when, on the face of the statute the meaning attributed to the immunity clause can not be given to it without destroying the words of the statute and frustrating its obvious object and intent. This may not be denied, since the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.

"The argument that because the section does not contain an expression of the reservation of a right to prosecute for perjury in harmony with the reservations in Rev. Stat. § 860, and the Act of 1893, therefore, it is to be presumed that it was intended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity, in the absence of the most express and specific command to that effect. Bearing in mind the subject dealt with, we think the reservation of the right to prosecute for perjury, made in the statutes to which we have referred, was but the manifestation of abundant caution; and hence, the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure.

"Some of the considerations which we have pointed out were accurately expounded in *Edelstein v. United States*, 17 Am. B. R. 649, 149 Fed. 636, L. R. A. (N. S.) 236, 79 C. C. A. 328, by the Circuit Court of Appeals for the eighth circuit, and in *Wechsler v. United States*, 19 A. B. R. 1, 158 Fed. 579, 86 C. C. A. 37, by the Circuit Court of Appeals for the second circuit. And this leads us to observe that the necessary result of the conclusion now reached is to disapprove the opinions in *Re Marx* (D. C. Ky.), 4 A. B. R. 521, 102 Fed. 676, and *Re Logan* (D. C. Ky.), 4 A. B. R. 525, 102 Fed. 876.

"It follows that the question propounded must receive a negative answer, and our order will be, question certified answered 'No.'"

Edelstein v. United States, 17 A. B. R. 658, 149 Fed. 636 (C. C. A. Minn.): "The government contends that the immunity has sole reference to the use of evi-

dence in a prosecution for some offense to which his evidence related; that Congress offered as an inducement to a full, frank, and truthful disclosure by a bankrupt for the benefit of his creditors of all matters and things concerning his property and estate that his evidence should not be used against him in any prosecution for any such offense, however much it might implicate him.

"Defendant's argument is that the language employed is comprehensive and unequivocal; 'that no testimony given by him shall be offered against him in any criminal proceeding; 'that it, in terms, prohibits the use of the negative answer given by the bankrupt to the question propounded to him, although knowingly and intentionally false, as a basis for the criminal charge involved in the indictment now under consideration. To this we can not give our assent. There is no rule requiring a literal construction to be placed even upon unambiguous words of a particular clause of a statute without consideration of its context. The meaning of specific words in one part of a statute is often controlled by other provisions of the same act, and frequently by provisions of other acts which are in part materia. * * *

"Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words 'any criminal proceeding can not sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony."

And the fact that the Bankruptcy Act provides for the crime of "False Oath" does not vitiate an indictment for perjury drawn under the U. S. Revised Stat., § 5392, for the essential elements are the same.³⁵ Nevertheless, the special provision of the Bankruptcy Act controls, and excludes any other punishment than that prescribed in the Bankruptcy Act.

Where the bankrupt is indicted for testifying falsely in one part of his examination, his testimony in other parts of the same examination may be given in evidence against him if tending to support the indictment.

Daniels v. United States, 27 A. B. R. 790, 196 Fed. 459 (C. C. A. Ohio): "What, then, is this reasonable construction to be applied to other situations as well as the *Glickstein* case? It is that the purpose of the so-called immunity clause is to supplement the constitutional provision against compelling self-incriminating evidence, or, rather, to minimize the possible obstructive effect of this provision; that this constitutional provision can have reference only to crimes which have already been committed at the time when the evidence is compelled; that this statute must have the same construction; and so that it does not have reference to any examination. Applying this construction, it is manifest that where the bankrupt is indicted for testifying falsely in one part of his examination, his testimony in other parts of the same examination, if tending to support the indictment, may be given in evidence against him."

§ 2324½. Incriminating Questions—Constitutional Rights Preserved.—The constitutional right of a witness to refuse to answer ques-

³⁵ *Wechsler v. United States*, 19 A. B. R. 1, 158 Fed. 579 (C. C. A. N. Y.); *Ills.*,
impliedly, *Epstein v. United States*, 28 A. B. R. 561, 196 Fed. 354 (C. C. A.

tions, or to include reference in his schedules to certain transactions, or to produce documents, or other evidence [except such as pass to the trustee as property under § 70 (a)] that in his estimation would tend to incriminate him, is preserved, both as to bankrupts, and as to all other witnesses; and this is so notwithstanding that, as to the bankrupt, under § 7 (9), no testimony given by him may be offered in evidence against him in any criminal proceedings, this statutory protection of the bankrupt from the use of such testimony not being so broad as his constitutional privilege to refrain from giving it altogether.³⁶

But the privilege of refusing to produce incriminating evidence against oneself does not prevent the court from compelling surrender to the trustee of documents, books and papers title to which passes to him by the express provision of § 70 (a) (1).³⁷ And such books and documents, it has been held, may be used as evidence before the grand jury in a criminal prosecution against the bankrupt.³⁸

§ 2325. Others than Bankrupt Indictable for "False Oath."—A person need not be a bankrupt in order to be indictable for making a "false oath" in a bankruptcy proceedings.

Thus, an officer of bankrupt corporation may be so indicted.³⁹

So, it has been held that false swearing in bankruptcy proceedings is nothing more nor less than perjury, and, consequently, one who suborns another to make, knowingly and fraudulently, a false oath or account in, or in relation to, any proceeding in bankruptcy, may be convicted thereof under the Penal Code (§§ 125, 126).⁴⁰

§ 2326. But Only Bankrupt Indictable for Concealment of Assets from the Trustee.—But only the bankrupt is indictable for concealment of assets from the trustee.⁴¹

Thus, it has been held an officer of a bankrupt corporation may not be indicted under § 29 for concealing assets, for it is only concealments by bankrupts that the statute is directed against, and the officer is not the bankrupt, in criminal prosecutions.⁴²

Field v. United States, 14 A. B. R. 507, 137 Fed. 6 (C. C. A. Ark.): "The officer of bankrupt corporation, who is not and has not been a bankrupt, is not liable to punishment under § 29b of the Bankruptcy Law, 1898, for having fraudulently and knowingly concealed the property of the estate of the corporation in bankruptcy from its trustee. The present or past bankruptcy of the person accused is an indispensable element of the offense denounced by the statute."

36. See discussion, ante, § 1558, et seq.

37. See ante, § 1558, et seq.

38. See ante, § 1558.

39. *United States v. Lake*, 12 A. B. R. 270, 129 Fed. 499 (D. C. Ark.).

40. *Epstein v. United States*, 28 A. B. R. 561, 196 Fed. 354 (C. C. A. Ill.).

41. *United States v. Waldman*, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.); *United States v. Grodson*, 21 A. B. R. 68, 164 Fed. 157 (D. C. Ills.).

42. *United States v. Lake*, 12 A. B. R. 270, 129 Fed. 499 (D. C. Ark.). Contra, *United States v. Freed*, 25 A. B. R. 89, 179 Fed. 236 (D. C. N. Y.), quoted at § 2326½.

But there may be a conspiracy to conceal where neither conspirator is, strictly speaking, a bankrupt; thus, if he be an officer of a bankrupt corporation,⁴³ where the corporation only is bankrupt;⁴⁴ and the reasoning of *Field v. United States* has been dissented from, the court saying that if an officer of a bankrupt corporation may be guilty of conspiring to commit the act of concealing assets, it can not be that he is not guilty if the conspiracy is accomplished.⁴⁵

§ 2326½. **Corporation Indictable.**—A corporation may be indicted for concealment of assets, even concealment in anticipation of bankruptcy.⁴⁶

And it has been held that the officer of a corporation participating in the concealment is indictable.

United States v. Freed, 25 A. B. R. 89, 179 Fed. 236 (D. C. N. Y.): "The crime of concealing assets could be committed by a corporation and Freed could be indicted on the offense if he participated in its commission. *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. 2nd Cir.); *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110. Those were cases of conspiracy; but, if one may be guilty of conspiring to commit an act, it can not be that he is not guilty if the conspiracy is accomplished. I do not regard *Field v. United States*, 14 A. B. R. 507, 137 Fed. 6 (C. C. A.), as binding, after *Cohen v. U. S. supra.*"

Likewise, where participating in a conspiracy to conceal.^{46a}

Where the officers of the corporation are indicted for conspiracy to procure the bankrupt corporation to conceal assets, the indictment should show their connection with the corporation as such officers.⁴⁷

§ 2327. **Essential Elements in Proof of "False Oath."**—Upon the trial of an indictment for the commission of a "false oath" on general examination, it must be proved that the oath was an oath authorized by the Statute; that it was in fact administered; that it was administered to the defendant; that it was so administered by one authorized to administer it; that the testimony was willfully false; and was material to the subject under investigation.⁴⁸

The crime of "false oath" in bankruptcy is nothing more nor less than the crime of perjury.

43. *United States v. Grodson*, 21 A. B. R. 68, 164 Fed. 157 (D. C. Ills.); *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.).

But compare, *United States v. Waldman*, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.).

44. *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

45. *United States v. Freed*, 25 A. B. R. 89, 179 Fed. 236 (D. C. N. Y.), quoted at next section.

46. *United States v. Freed*, 25 A. B. R. 89, 179 Fed. 236 (D. C. N. Y.); *United States v. Young & Holland &*

Co., 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

46a. See § 2326. Also, *U. S. v. Grodson*, 21 A. B. R. 68, 164 Fed. 157 (D. C. Ills.); *U. S. v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); *Cohen v. U. S.*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.).

47. *United States v. Waldman*, 26 A. B. R. 677, 188 Fed. 524 (U. S. C. C. N. Y.).

48. *United States v. Wechsler*, 16 A. B. R. 1 (D. C. N. Y.); *United States v. Wechsler*, 16 A. B. R. 1 (D. C. N. Y.), reversed, on other points, in *Wechsler v. United States*, 19 A. B. R. 1, 158 Fed. 579 (C. C. A.). See post, "False Oath as Bar to Discharge," § 2523.

Epstein v. United States, 28 A. B. R. 561, 196 Fed. 354 (C. C. A. Ills.): "In our judgment false swearing in bankruptcy proceedings is perjury, nothing more or less. Section 5392 (§ 125 of the Penal Code) clearly covers that and every other way of committing the crime. Section 29 of the Bankruptcy Act simply singles out that one form for a milder punishment. Two sections cover the offense, one generally, the other specifically. So the specific section has effect only in restricting punishment. Combined, the effect is exactly as if there were only one section denouncing and punishing perjury, as follows: 'Whoever, having taken an oath * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than \$2,000 and imprisoned not more than five years: Provided, that if the perjury be committed in a bankruptcy proceeding the guilty person shall be punished by being imprisoned not more than two years.'"

An oath before the referee is sufficient.⁴⁹ The fact that the referee was absent from the room wherein the examination was held is not material, providing he was within hearing of the witness all the time, especially where no objection was made at the time.⁵⁰

And it has also been held that an oath before a special commissioner, appointed under § 21a "for general examination," before adjudication of bankruptcy, is sufficient.^{50a}

§ 2328. In Proof of "Concealment of Assets."—The essential elements in the proof of concealment of assets are well set forth in the charge to the jury in *U. S. v. Levinson*, 13 A. B. R. 29 (D. C. S. C.) and are explicated hereinafter under the subject of "Concealment of Assets as Bar to Discharge."⁵¹

A conviction may properly be based on circumstantial evidence;⁵² but

49. *United States v. Simon*, 17 A. B. R. 41 (D. C. Wash.).

50. *Kovoloff v. United States*, 28 A. B. R. 767, 202 Fed. 475 (C. C. A. Ill.).

50a. *United States v. Liberman*, 23 A. B. R. 734, 176 Fed. 161 (U. S. C. N. Y.). Also compare ante, § 1543.

51. See ante, § 2302½; post, § 2487, et seq.; also, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.). See also discussion of testimony as to removal of goods from store, *Bean v. United States*, 27 A. B. R. 759, 192 Fed. 859 (C. C. A. Mass.).

Filing amended schedule to escape criminal prosecution ineffective. *Kern v. U. S.*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.).

Exclusion of evidence, when harmless error. *Kern v. U. S.*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.).

What Is "Concealment."—*United States v. Phillips*, 27 A. B. R. 625, 196 Fed. 574 (D. C. N. Y.): "A thing is secreted or concealed from the officer of the law, and indeed from any-

one, when the seeker knows perfectly well who controls it, who has hidden it and who can reveal it if he desires. Therefore, since the law is not merely a game of hide and seek, that is concealed or secreted which is withheld by means of physical concealment from the lawful officer who is looking for it. The word 'withhold' is wider than either 'conceal' or 'secrete'; e. g., a bankrupt may withhold money by stubbornly refusing to pay, and defying his creditors to get it out of him; but this expression would not necessarily or ordinarily be taken to mean that the bankrupt had obtained certain gold coin or bank notes and concealed the same by burying them in the earth or putting them in a receptacle known only to himself; while such would be the reasonable inference if the bankrupt were accused of concealing money—i. e., he would be understood to have hidden actual cash, like the misers of fairy tales."

52. *Stern v. United States*, 28 A. B. R. 101, 193 Fed. 888 (C. C. A. Pa.).

the guilt of the defendant must be established beyond a reasonable doubt.⁵³

§ **2329. Advice of Counsel.**—Advice of counsel may negative criminal intent.⁵⁴

§ **2329 1/10. Extortion.**—Section 29 (b) (5) of the Bankruptcy Act makes it a punishable offense to have extorted or to have attempted to extort any money from any person as a consideration for acting or forbearing to act in a bankruptcy proceedings.⁵⁵

§ **2329 2/10. Receiving Property from Bankrupt.**—It is a crime against the act for any person knowingly and fraudulently to receive a material amount of property from a bankrupt, after the filing of the petition, with intent to defeat the act.⁵⁶

It was said to be such a crime for a creditor to receive settlement money from a bankrupt where after a petition was filed, an order was granted requiring the receiver to turn back the money to the bankrupt because of failure to file his bond, whereupon the bankrupt had proceeded to make a 40 per cent settlement with most of his creditors, but the petition was not dismissed.⁵⁷

§ **2329 3/10. Statute of Limitations.**—No one may be prosecuted under § 29 of the act unless the indictment be found or the information be filed within one year after the commission of the offense.⁵⁸

The doctrine of "continuing concealment" does not toll the bar of the statute of limitations where all affirmative *acts* of concealment, including the failure to schedule the concealed assets, occurred more than a year before the information is found, even though the bankrupt failed to notify his trustee at any time thereafter of the concealment, mere passivity when not called upon to perform a positive act, not being concealment.⁵⁹

United States v. Phillips, 27 A. B. R. 625, 196 Fed. 574 (D. C. N. Y.): "The government, by proving that a bankrupt many years ago secreted some articles of property from his trustee, which fact the trustee knew or had good cause to believe and for which property demand has duly been made, thereby raises the presumption (apparently irrebutable) that the crime had continued and

53. *Chodowski v. United States*, 28 A. B. R. 62, 194 Fed. 858 (C. C. A. Ill.).

54. *Obiter, McNeil v. United States*, 18 A. B. R. 21, 150 Fed. 82 (C. C. A. Tex.); *Kern v. United States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.); post, §§ 2491, 2492, 2536.

As to this subject, see similar subjects under "Fraudulent Concealments" and "False Oaths" as bars to discharge, post, §§ 2487, 2523.

55. But the mere fact that one loaned money to a bankrupt to be used in paying the consideration of a composition with his creditors in bankruptcy proceedings, with the understanding that

such sum would be repaid together with a debt owing to the lender which was dischargeable, is not extortion within the meaning of the act. *Zavelo v. Reeves*, 29 A. B. R. 493, 227 U. S. 625.

56. Bankr. Act, § 29b. (4); *United States v. Comstock*, 20 A. B. R. 525, 161 Fed. 644 (D. C. R. I.). *Obiter*, Board of Commissioners of Kansas *v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.).

57. *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

58. Bankr. Act, § 29 (d).

59. *Warren v. United States*, 29 A. B. R. 555, 199 Fed. 753 (C. C. A. La.).

would continue as long as the criminal lived and did not surrender. This is exactly the situation painted with disapproval in the Irvine case (page 452), and to look upon the facts otherwise to overrule and disregard statutes of limitation generally. If Phillips can be successfully prosecuted under this indictment, every living bankrupt who has been suspected of concealing property can at any time be indicted therefor. I do not so read the act.

"More than 12 months before the indictment was found he did the things relied on as constituting concealment. Within the 12 months before the indictment he did nothing but remain passive and silent. He did not schedule the alleged concealed property, but the schedules omitting it were filed more than 12 months before the indictment. * * * The United States attorneys, in the forcible argument presented for the government, contend that the offense charged is a continuing offense, and that the statute of limitations does not begin to run until the termination of the concealment 'or until the bankrupt has abandoned his effort to conceal the property;' that as long as he 'fails to notify the trustee of the whereabouts of the property, the concealment continues, and there is no statute of limitations to prevent the prosecution.' * * * The government's contention, therefore, must fall, unless the mere silence and passivity of the defendant after the alleged concealment makes the crime a continuing one, so that, to quote the brief, 'there is no statute of limitations to prevent the prosecution.'

"We can not concede that such is the case. * * *. If the contention of the government were correct the statute of one year, while in terms it is made to apply to cases of concealing assets, would in practice seldom have any application. Twenty years after the appointment of the trustee the bankrupt could be prosecuted for concealing assets, and the government could prove that he had purchased certain goods shortly before the bankruptcy, that such goods were not surrendered, and then, by proof of some circumstances from which the jury might determine that there had been concealment, have a case sufficient to go to the jury. Twenty years having elapsed, the defendant's witnesses might be gone or dead, and even his own memory might fail him in making a satisfactory explanation. * * *

"It is true that there may in some cases be difficulty in showing when the act or series of acts occurred which made the crime complete; but when the property is knowingly and fraudulently concealed from the trustee—a fact that may be proved like any other fact—the bankrupt is liable to prosecution and the statute of limitations begins to run. In other words, it runs from the time of the commission."

But this overt act need not be the initial act of removing or secreting the property; it is an overt act of concealment to fail to declare the property when questioned with relation thereto on general examination or to fail to schedule the property when it is his duty to schedule it.⁶⁰

However, such limitation does not apply to indictments for conspiracy to commit an offense against the Bankruptcy Act, for such indictments are not brought under § 29 of the Bankruptcy Act, but under Rev. Stat., U. S., § 5440.⁶¹

Obiter, *Warren v. United States*, 29 A. B. R. 555, 199 Fed. 753 (C. C. A. La.): "There are certain conspiracies where the statute would not begin to run when the conspiracy is completely formed, because the plot contemplates the bringing to pass a continuous result that will not continue without the continuous co-

60. Compare ante, "Continuing Concealment," § 2319.

61. *United States v. Comstock*, 20 A. B. R. 525, 161 Fed. 644 (D. C. R. I.).

operation of the conspirators. In such case the crime contemplates something to be done in the future to forward the criminal purpose. *United States v. Kissel*, 218 U. S. 601, 607. * * *. If the indictment here were for a conspiracy to conceal property of the bankrupt from the trustee, and contemplated continuous acts in which the conspirators were to co-operate to carry out the criminal intention, the statute of limitations would not begin to run at the completion of the conspiracy; for the offense charged would be continuous, contemplating continuous future action to complete the crime. But here we have no such charge and no such proof. The defendant is charged with the act of fraudulently concealing certain property. The fact that concealed property remains concealed does not continue the offense of concealing it, for 'continuance of the result of a crime does not continue the crime.' The murdered man continues to be dead, but that does not make his murder a continuing offense."

§ 2329 4/10. Suppression of Criminal Prosecution.—The court will not sanction a compromise based upon the stifling of a criminal prosecution of the bankrupt, even though thereby assets are brought into the estate.⁶²

§ 2329 5/10. Miscellaneous Matters of Practice.—Proofs of claims are not admissible as against the bankrupt, at any rate, not unless showing be made that the bankrupt had examined and approved them.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.): "Clearly, unless some special reason is shown to the contrary, these proofs were strictly *inter alios*, mere declarations of third persons; and the admission of them was a plain violation of the rule relative to the use of that class of evidence. It is claimed, however, by the United States, that it was the duty of Jacobs, under the statutes in bankruptcy, to examine the claims when offered in proof, and to advise if they were not correct. This, however, is only a partial statement, and what is omitted is fatal to the proposition. It is true that § 7 of the Act of July 1, 1898, * * * provides that, in the case of any person having to the knowledge of the bankrupt proved a false claim, he (the bankrupt) shall disclose that fact to his trustee; but it also further provides that he shall not be required 'to examine claims except when presented to him unless ordered by the court or a judge thereof for cause shown.' There is no evidence in the record of any such presentation to Jacobs of the claims in question, or that he had any actual knowledge of what was proved against the estate, or that he had ever been requested in any way to take any part in reference thereto. Consequently, the admission of this evidence was clearly erroneous and prejudicial."

Privileged communications are to be respected; but in accordance with state law communications to the wife must be confidential. The rules as to privileged communications between husband and wife are different in examinations under § 21 (a).^{62a}

The filing of amended schedules or other act "meet for repentance," after discovery, is ineffective to avoid the criminal prosecution, though it may be taken into account in fixing sentence.⁶³

⁶². In *re Rosenblatt*, 18 A. B. R. 663, 153 Fed. 335 (D. C. Pa.); *Mulford v. Fourth St. Nat. Bank*, 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

^{62a}. See *ante*, § 1566.

⁶³. *Kern v. United States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.),

quoted at § 2543.

Limits of Right of Examination, Cross-Examination and Re-Direct Examination.—See *Jacobs v. U. S.*, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

One who commits an unlawful act knowing that it is unlawful can not be heard to say he did it with innocent intent. The law presumes that every sane person intends the necessary consequences of his act.⁶⁴

The burden of proof is on the government to establish the defendant's guilt beyond reasonable doubt.

Chodkowski v. United States, 28 A. B. R. 62, 194 Fed. 858 (C. C. A. Ill.): "The burden of proof was on the government to establish the guilt of plaintiff in error beyond a reasonable doubt. These propositions are too well settled to require citation of authorities."

The presumption of innocence is to prevail until guilt is proved.

Chodkowski v. United States, 28 A. B. R. 62, 194 Fed. 858 (C. C. A. Ill.): "Plaintiff in error was entitled to have the jury instructed that, if they found from the evidence that Chodkowski and wife conveyed to Wojnowski the lots in question by warranty deed, then the law presumes that in so doing appellant acted legally and in good faith, and required that the jury should give him the benefit of that presumption."

The adjudication in bankruptcy may not be collaterally impeached.⁶⁵

It would seem that it is not necessary in conspiracy cases that a writ of error to review a conviction be joint; it is in accordance with the authorities and practice that each may sue out separate writs.⁶⁶ But the citation on the writ is defective where it does not give the names of all applicants for the writ.⁶⁷

Error does not lie for the denial of a motion to quash an indictment on account of anything which may be raised by demurrer.⁶⁸

§ 2329 6/10. Disqualification of Judge, for Notifying Authorities of Probable Commission of Crime.—It is undoubtedly the right of the court and also his duty to cause the United States attorney or other proper authorities to be notified of the probable commission of crime. Nor does it disqualify the court to sit in the case as becoming "concerned in interest" or "of counsel" for the prosecution.

Epstein v. United States, 28 A. B. R. 561, 196 Fed. 354 (C. C. A. Ills.): "Plaintiff in error filed an affidavit in which he alleged that the judge was conducting a hearing in a bankruptcy case for the purpose of discovering assets; that at the conclusion of the hearing the judge appeared to be angry and said in the presence and hearing of affiant, 'This is a nasty piece of business; this estate has been looted by some one;' that the judge then turned to a gentleman standing at the bar and said: 'Use what is left of this estate, even to the last penny, to investigate this matter, and if any one, whoever he may be, has committed any act that can be reached and punished under the law, institute proceedings against him.'"

"On this it is asserted that the judge was 'concerned in interest' in the case,

64. *Radin v. United States*, 25 A. B. R. 640, 189 Fed. 568 (C. C. A. N. Y.).

65. *United States v. Freed*, 25 A. B. R. 89, 179 Fed. 236 (D. C. N. Y.).

66. *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

67. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

68. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

and became 'of counsel' for the prosecution. Official duties of the trial judge include his instructions to grand jurors to investigate alleged violations of law, which may be brought to their attention by the district attorney or otherwise, and of whose actual existence the judge personally knows nothing. If in the course of official business in court the judge sees that an offense against the Penal Code has been or is being committed, does his official duty require him to ignore the matter? No, we say. For him to fail to direct an investigation to be made would be not merely an abandonment of his post as a minister of the law, but as well an implied approval or condonation of the offense. To direct a prosecuting officer (and presumably the 'gentleman standing at the bar' was an officer who pursued the inquiry which resulted in the indictment) to inquire into a matter occurring in court, certainly no more than charging a grand jury, makes the judge 'concerned in interest' or 'of counsel' for the prosecution within the meaning of § 601."

CHAPTER XLIV.

CONTEMPTS.

Synopsis of Chapter.

- § 2330. Contempt, What Constitutes, in General.
- § 2330 $\frac{7}{8}$. Distinction between Civil and Criminal Contempt.
- § 2330 $\frac{1}{4}$. Dealing with Bankrupt's Assets after Oral Notice of Bankruptcy.
- § 2330 $\frac{1}{2}$. Failure to File Schedules, as Contempt.
- § 2330 $\frac{3}{4}$. Failure to Obey Summary Orders.
- § 2331. "Willfully Evasive" or "Flagrantly False" Testimony in Face of Court, Contempt.
- § 2331 $\frac{1}{2}$. Interference with Property in Custody.
- § 2332. Contempt Not in Presence of Court.
- § 2333. Advice of Counsel.
- § 2334. Contempt before Referee, What Constitutes, Defined by Statute.
- § 2335. Referee Has No Power to Commit.
- § 2336. Referee Simply to Certify Facts to Judge.
- § 2337. Making of Certificate, Judicial Act, Not Ministerial Duty.
- § 2337 $\frac{1}{4}$. Weight of Referee's Findings as to Contempt.
- § 2337 $\frac{1}{2}$. Entitled to Notice and Hearing before Certificate.
- § 2338. Judge to Hear and Punish, if Contempt Committed.
- § 2339. Power to Commit, Cautiously Exercised.
- § 2340. Evidence to Be beyond Reasonable Doubt.
- § 2341. No Punishment for Failure to Comply with Order until Opportunity Given to Show Inability.
- § 2341 $\frac{1}{4}$. Whether Original Evidence on Order to Surrender Assets Re-Examined on Contempt for Disobedience of Order.
- § 2341 $\frac{3}{8}$. Conditional Order of Commitment.
- § 2341 $\frac{1}{2}$. Purging from Contempt.
- § 2342. Review of Refusal to Certify.
- § 2343. Not Reviewable by Habeas Corpus.
- § 2344. Order of District Judge Not Reversed Except for Clear Error.
- § 2344 $\frac{1}{2}$. Whilst in Contempt Not to Be Heard.
- § 2344 $\frac{3}{4}$. Discharge from Custody.

§ 2330. Contempt, What Constitutes, in General.—What will constitute contempt of the United States district court as a court of bankruptcy, is left in general to the ordinary rules of law upon the subject.¹

1. Instance, willfully evasive testimony in face of court. *In re Fellerman*, 17 A. B. R. 789, 149 Fed. 244 (D. C. N. Y.).

Instance, *United States v. Goldstein*, 12 A. B. R. 755, 132 Fed. 789 (D. C. Va.); instance, *In re Home Discount Co.*, 17 A. B. R. 170, 147 Fed. 538 (D. C. Ala.).

Instance, obiter, instituting suits in state courts to recover property in specie from bankruptcy trustee. *Turrentine v. Blackmore*, 4 A. B. R. 338,

125 Ala. 436, 28 So. 95.

Instance, disobedience of injunction restraining execution creditors from examining the bankrupt in supplementary proceedings. *In re Fortunato*, 9 A. B. R. 630, 123 Fed. 622 (D. C. N. Y.).

Instance, assaulting the trustee while the latter is performing the duties of his office. *Ex parte O'Neal*, 11 A. B. R. 196, 125 Fed. 967 (D. C. Fla.).

Instance, constable turning back to purchaser at execution sale excess of

In *re Mayer*, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.): "The district court has inherent power to summarily punish for contempt the concealment or withholding from the trustee of money or property traced to the possession or control of the bankrupt."

Boyd v. Glucklich, 8 A. B. R. 398, 116 Fed. 131 (C. C. A. Iowa): "Frequent reference is made to § 41 of the Bankrupt Act, as though that act invested courts of bankruptcy with broader and larger powers to punish for contempt than is possessed by other United States courts. It does nothing of the kind. This section does not in express terms confer on the court of bankruptcy the power to punish for contempt. But no such enactment was necessary. The moment the court was called into existence it became possessed of this power by the operation of the common law, as well as by § 725 of the Revised Statutes of the United States. The reference to the power to punish for contempt in § 41 of the Bankrupt Act was not to confer the power on the court of bankruptcy, for its creation alone invested it with that power, but it was to make it plain that the power was not conferred on referees in bankruptcy, and to confer it on the 'judge' of the court of bankruptcy, who could not exercise the power in the absence of the statute expressly conferring it. This is done by § 41b, in these terms:

"(b) The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner, and to the same extent as for a contempt committed before the court of Bankruptcy. * * *

"By reference to § 41 it will be seen that 'the things forbidden in this section,' concerning which the referee is required to certify the facts to the judge, in-

purchase price over amount of judgment and costs and denying receipt of same upon order of referee to surrender the same. In *re Geiser*, 12 A. B. R. 208 (D. C. Mont.).

Instance, disobedience of referee's order staying a suit to permit interposition of discharge. In *re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

Instance, where testimony on its face shows witness was refusing to tell of things he must have known. *United States v. Appel*, 31 A. B. R. 154, 211 Fed. 495 (D. C. N. Y.).

Instance, attorneys with knowledge of bankruptcy proceedings, replevying from sheriff whose lien had been annulled by the bankruptcy but who was still holding, under the referee in bankruptcy. In *re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa).

Instance, destruction of notes ordered to be turned over. In *re Star Spring Bed Co.*, 30 A. B. R. 208, 203 Fed. 640 (C. C. A. N. J.).

Instance, merely threatening to levy but not actually levying on property, after adjudication, held not contempt. In *re McBryde*, 3 A. B. R. 729, 99 Fed. 686 (D. C. N. Car.).

Instance, not contempt, In *re Watts*, 10 A. B. R. 113, 190 U. S. 1: Under advice of counsel, state court receiver compelling surrender of assets previously voluntarily surrendered by him to the receiver in bankruptcy.

Disobedience of order to produce books, In *re Alper*, 19 A. B. R. 612, 162 Fed. 207 (D. C. N. Y.). See ante, § 1548.

But the order must be definite. In *re Kalmanowitz*, 32 A. B. R. 210, 211 Fed. 167 (D. C. N. Y.).

Disobedience of mere general order to turn over all assets, books, etc., contained in order of appointment of receiver. *Skubinsky v. Bodek*, 22 A. B. R. 699, 172 Fed. 340 (C. C. A. Pa.); also, see ante, § 391, note.

Disobedience of interlocutory order requiring bankrupt denying insolvency to amend his answer by attaching list of debts and assets, see ante, §§ 179, note; 406, note.

Contempt for Reckless Squandering of Assets after Filing Petition.—In one case the bankrupt was punished for contempt for recklessly squandering assets after the filing of the bankruptcy petition. In *re Smith*, 26 A. B. R. 399, 185 Fed. 983 (D. C. N. Y.).

clude only those things which would be punishable as contempts by all courts of record. They are the common and familiar heads for the exercise of this jurisdiction by all courts of record. No new or enlarged jurisdiction is conferred, and no power to impose a punishment which might not rightly and lawfully be imposed, on a similar state of facts, by any other United States court. Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy; and any act, matter or thing which cannot be punished as a contempt by other United States courts cannot be punished as such by a court of bankruptcy. Moreover, the mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States courts as near as may be, and what is legally sufficient to purge a contempt in the other courts of the United States is sufficient to purge the like contempt in a court of bankruptcy. * * *

"The seventeenth section of the Judiciary Act of 1789 (now § 725 of the Revised Statute of the United States), provides that all the courts of the United States 'shall have power to punish by fine or imprisonment at the discretion of said courts all contempts of authority in any cause or hearing before the same.' For what was esteemed an excessive and oppressive exercise of the power to punish for contempt under this section and at common law, the United States House of Representatives in 1831 adopted and presented to the Senate articles of impeachment against Judge Peck, judge of the United States District Court for the district of Missouri; and, though the judge was acquitted by the Senate, the Congress immediately testified its disapproval of his action, and put its repetition out of the power of the United States judges in the future, by the passage of the act of March 2, 1831, entitled 'An act declaratory of the law concerning contempts of court,' now part of § 725 of the revised statutes of the United States. This act applies to all courts of the United States which derive their existence and powers from acts of Congress, whether created before or after its passage. It defines and limits the powers of the courts of the United States to punish for contempt. Since the passage of this act the power of these courts in the punishment of contempts can only be exercised (1) to insure order and decorum in their presence; (2) to secure faithfulness on the part of their officers in their official transactions; and (3) to enforce obedience to their lawful orders, judgments, and processes. Formerly the only protection the citizens had against the unjust, oppressive or illegal exercise of this power was found (in the language of Judge Brewer *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747), 'in the publicity of all judicial proceedings, and the appeal which may be made to the Legislature for proceedings against any judge who proves himself unworthy of the power intrusted to him.' The case of Judge Peck is not the only instance in which redress was sought against the unwarranted exercise of this power by the impeachment of the judge. In 1807, articles of impeachment were preferred against the judges of the Supreme Court of Pennsylvania for an abusive exercise of this power, and, while they were acquitted, their trial led to the passage of the act of the Assembly of that State of 1809, limiting and restricting the power of the court to punish for contempt; and impeachment of judges for similar acts and like legislation has taken place in other States. Indeed, in this country the power of the courts to punish for contempt has always been looked on with jealousy, and a very strong disposition shown to restrict it. It has been declared to be 'arbitrary in its nature' (*Batchelder v. Moore*, 42 Cal. 412); to be an exception to the provisions of the Constitution of the United States, and not to be extended in the least degree beyond the limits imposed by statute. *Rap. Contempt*, § 11; *Rutherford v.*

Holmes, 5 Hun 317; Bergh's Case, 16 Abb. Pr. (N. S.) 266; *People v. Jacobs*, 66 N. Y. 8; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205. And in a note in 1 Kent. Com. 330, note 'b,' it is said 'that the power of the courts to punish summarily for contempts has lately been much restricted in England.' Not only has the power to punish for contempts been very much restricted, but in many jurisdictions the right of appeal and review of such proceedings has been allowed. And the right of review of the proceedings in the case of an alleged constructive contempt, like the one in the case at bar, is given by the Bankrupt Act."

Ex parte O'Neal, 11 A. B. R. 198, 125 Fed. 967 (D. C. Fla.): "Unquestionably the District Court had jurisdiction summarily to try and determine these questions, and, having such jurisdiction, said court was fully authorized to hear and decide and adjudge upon the merits."

It has been held that the power to punish for contempt may be exercised either under the general power of all courts to punish contempts, or under the specific provision of the Bankruptcy Act, § 2, p. 15, "to enforce obedience by bankrupts, officers and other persons to all lawful orders by fine or imprisonment, or fine and imprisonment."² The power of courts to protect themselves and their process being inherent, it would seem that the power to punish for contempt could only be curtailed by express prohibition.

However, it has been held that the power of the federal District Court (including courts of bankruptcy) in contempt matters is limited to the cases enumerated in § 725, U. S. Rev. Stat. Hence, where the bankrupt before the appointment of a receiver is holding his assets subject to the orders of the Bankruptcy Court and converts a portion of them into money which he appropriates to his own use, he is not guilty of a punishable contempt, it not appearing that he had violated any order of the court.⁴

In re Probst, 30 A. B. R. 600, 205 Fed. 512 (C. C. A. N. Y.): "Generally speaking the misappropriation and dissipation by the bankrupt of funds in custody of the court which he has promised to hold subject to its order might fairly be considered a contempt of court. The difficulty here, however, is that the power of the federal District Courts to punish contempts has been so circumscribed by Congress that it can be exercised only in the cases enumerated in section 725, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 583). These cases are:

" 'Misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.'

"It seems to us that the bankrupt's misappropriation of the money in his hands is not within the first of these clauses, 'misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.' He is not an 'officer of the court' who has misbehaved in his official transactions. Our attention has been called to no writ, process, order, rule, decree, or command of the court which he has disobeyed. Had an order been made directing him

². *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.), quoted at §§ 1856, 1859½.

⁴. *Boyd v. Glucklich*, 8 A. B. R. 398, 116 Fed. 131 (C. C. A. Ia.), quoted supra this section.

to pay the amount of the misappropriated money into the registry of the court, and he had disobeyed such order, he would be within the provisions of the section but on the record presented here we cannot find authority for the entry of the order sought to be reviewed. This may be a highly technical ruling; but where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course."

§ 2330¾. Distinction between Civil and Criminal Contempt.

—The distinction between civil and criminal contempt must be borne in mind, both as to the punishment inflicted, and as to the procedure. There is an essential difference in the nature of the two proceedings, and while it is sometimes difficult to classify an act as being a civil or a criminal contempt, inasmuch as it may partake of the characteristics of both, yet the punishment inflicted is for entirely different purposes in the two cases. In a civil contempt, the act is treated more as a resistance to the opposite party than as a direct contempt of the court. Thus, the refusal to comply with an order to which the opposite party is entitled is in general a civil contempt and the punishment is remedial, intended to coerce the party to perform the act, and is for the benefit of the opposite party. The decree in such case should be that the party be committed unless, and until, he perform the act. On the other hand, a criminal contempt is treated as a resistance to the court, as for instance where the party has done some act which he had been commanded not to do, and the imprisonment could not remedy the matter nor benefit the opposite party. In such case the imprisonment is imposed as a punishment, and is for a fixed term as a vindication of the court's authority, and not in any sense for the benefit of the opposite party.⁵

Gompers v. Buck Stove & Range Co., 221 U. S. 418: "Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both' *Bessette v. Conkey*, 194 U. S. 329. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant disobeyed the order and a prayer that he be attached and punished therefor. It is not the fact of the punishment, but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court. It is true that imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted, not only in the imposition of a fine, payable to the complainant, but also in committing to prison. But the imprisonment for contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order, which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he has refused

5. In *re Stern*, 32 A. B. R. 281, — N. Y.); *Kirsner v. Taliaferro*, 29 A. B. Fed. — (D. C. N. J.); In *re Forkas*, R. 832, 202 Fed. 51 (C. C. A. Va.). 30 A. B. R. 337, 204 Fed. 343 (D. C.

to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

"For example, if the defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but it is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *In re Nevitt*, 117 Fed. Rep. 451, 'he carries the keys of his prison in his own pocket.' He can, under the sentence, discharge himself at any moment by doing what he had previously refused to do.

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment can not undo or remedy what has been done nor afford any compensation for pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, he can not shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as a punishment for the completed act of disobedience. * * *

"The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of punishment."

Again, a civil contempt is a proceedings between the original parties, instituted by the complainant for his benefit, while a criminal contempt is between the government and the defendant and is not a part of the original cause.

Gompers v. Buck Stove & Range Co., 221 U. S. 418; "There is another important difference. Proceedings for civil contempt are between the original parties and are instituted and treated as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant and are not a part of the original cause."

Thus, in a civil case, it is reversible error to impose a sentence for a fixed term, but the imprisonment should be only for the purpose of securing the performance of the act required, the defendant to be released upon performance.

In re Kahn, 30 A. B. R. 322, 204 Fed. 581 (C. C. A., N. Y.) "The recent decision of the Supreme Court of the United States in *Gompers v. Buck Stove Co.*, 224 U. S. 418, 31 Sup. Ct. 492, lays down the rules which must be followed by the federal courts in administering the law of contempt. In that decision it is said that the character and purpose of the punishment distinguish civil and criminal contempts. The punishment for a civil contempt is remedial and for the benefit of the complainant in the contempt proceedings. The punishment for a criminal contempt is punitive—to vindicate the authority of the court. If imprisonment be imposed in a civil proceeding it must be coercive in its nature. The committal

must stand only unless and until the defendant performs the affirmative act required by the court's order. When inflicted in a criminal proceeding it is fixed and certain as a punishment for completed disobedience of orders or for other past wrongdoing.

"The classification of contempts and contempt proceedings made by the Supreme Court in the Gompers case is general in its application and applies as well in cases arising in bankruptcy proceedings as in other causes. Whatever may be the source of the power of bankruptcy courts to punish for contempt, it must be exercised according to the general principles laid down.

"Applying then the principles of the Gompers case it is evident that when it appears that a sentence to a fixed and absolute term of imprisonment has been imposed it can be justified only by showing that it was inflicted in a proceeding for criminal contempt. Such a punishment was imposed in this case. Nothing the defendant could have done would have prevented his imprisonment for the full term of ten days. That part of the punishment was to vindicate the authority of the court. The coercive part—the part to aid the complainant—did not become operative until after the punitive part had been complied with. The latter must be supported, if at all, by establishing that it was made in a criminal proceeding.

"Were the proceedings criminal in their nature? The most important question bearing upon this is whether they were between the public and the defendant. They were not. The complainant was the attorney for the receiver in bankruptcy and the contempt proceedings were really in behalf of the latter. The petition was not entitled as in a criminal case. The order bore the title of the main bankruptcy proceedings. The prayer for relief was for an adjudication in contempt and for further relief to the petitioner. All the indicia of a civil cause incidental to the proceedings in bankruptcy, and none whatever of a criminal case were present."

On the other hand, where the act is completed, and committed in defiance of the court, rendering it impossible for the court to give any remedial relief, it is a criminal contempt and a sentence for a definite term is a proper punishment.

In *re Star Spring Bed Co.*, 30 A. B. R. 208, 203 Fed. 640 (C. C. A. N. J.): "As a direct result of their willful acts the notes have either been destroyed or have gone beyond their, or the court's power to reclaim them. In so doing, all possibility of affording any remedial relief to the parties in interest has passed beyond the court's power, and they (Makowsky and Silberberg) have themselves removed the case from the sphere of remedial contempt where a court might make the contempt commitment conditional on the notes being returned, and where, as said in *In re Nevitt*, 117 Fed. 461, the person adjudged in contempt 'carries the keys of his prison in his own pocket.' By their conduct they have gone further and made the case one of punitive contempt where the only thing left is for the court by a definitive sentence to punish for a past disobedience and afford an example to others so minded. Indeed, the disobedient refusal to deliver these notes and their subsequent surrender and destruction has brought about a condition fully described in the words of the Supreme Court in 221 U. S. 442." [*Gompers v. Buck Stove & Range Co.*, quoted *supra*.]

However, the mere entitling of the papers in the bankruptcy proceedings, as in a civil case, will not render a punishment by a fixed term of imprisonment improper, where in fact the proceeding is instituted and carried on against the defendant by and before officials representing the public,

and the act itself constitutes a criminal contempt. Thus, where the bankrupt refuses to submit himself to "an examination according to law" and it appears that the referee certified the question officially and of his own motion and that the district judge also acted upon his own initiative, the proceedings are proper for a case of criminal contempt and a punishment by a definitive sentence will not be disturbed.

In *re Kaplan Bros.*, 32 A. B. R. 305, — Fed. — (C. C. A. Pa.): "It is further objected that this was not a criminal proceeding for contempt so as to justify the imposition of a fixed term of imprisonment. Little need be said upon this subject; the facts do not support the argument. The record shows that the referee certified the question 'officially and of my own motion;' and that the district judge also acted upon his own initiative in entering the rule to show cause. Moreover, the government subsequently took charge of the proceedings, and the United States attorney for this district appeared and defended in this court the action that had been taken below. The declared object of the referee, of the judge, and of the government, is to punish the contumacious conduct of the bankrupts as witnesses, in order to vindicate the authority of the law. The proceeding was not remedial in its nature but wholly punitive, and in our opinion therefore the contempt was properly punished by imposing a definite term of imprisonment. *Gompers v. Stove Co.*, 221 U. S. 441.

"We do not think *Re Kahn*, 30 Am. B. R. 322, 204 Fed. 581 (C. C. A. N. Y.) is in point. The present case did not include a prayer for civil relief, and there was no effort to obtain it. The sole object of the proceeding was punishment for contempt committed before a bankruptcy tribunal, and the action was begun and carried on against the defendants by and before officials representing the public. The mere entitling of the papers in the bankruptcy proceeding can not be decisive; courts look at the real nature of the thing done and not merely at the name it may bear."

§ 2330¼. Dealing with Bankrupt's Assets after Oral Notice of Bankruptcy.—Oral notice of an injunction or of the appointment of a receiver is sufficient to make subsequent interference with the assets a contempt.⁶

Compare, In *re Deeb Lufty*, 19 A. B. R. 614, 156 Fed. 873 (D. C. N. Y.): "The attorney for the creditor in the second attachment explicitly warned the sheriff against proceeding, and gave him full notice that the petition in bankruptcy was on file, that a receiver had been appointed and an injunction issued. The sheriff, however, after such notice, on the morning of the 15th, delivered an order for the goods to the attorney for the claimants. The goods were removed. On the argument of this motion the attorney for the claimants stated that they were still in the warehouse and would be returned. He subsequently asserted that he was mistaken, and that the goods had been removed from the country. The attorney for the under sheriff and the deputy sheriff asserts that they inferred, when the attorney for the petitioning creditor informed them that his claim was satisfied, that the bankruptcy proceedings were at an end. But they had no right to make any such assumption. A petition in bankruptcy is not disposed of by paying the petitioning creditor's claim. It may be availed of by any creditor, and sheriffs are bound to know the law in that respect. But upon the whole, al-

6. Instance, replevying after oral notice of appointment of receiver, In *re Wilk*, 19 A. B. R. 178, 155 Fed. 943 (D. C. N. Y.).

though the conduct of the under sheriffs in this case is subject to serious criticism, the proof of contempt in this case is not so clear that I should feel justified in finding them guilty of it."

§ 2330 $\frac{1}{2}$. **Failure to File Schedules, as Contempt.**—Failure of the bankrupt to file schedules may be a contempt.⁷

§ 2330 $\frac{3}{4}$. **Failure to Obey Summary Orders.**—The subject of contempt for the failure of bankrupts and others to obey summary orders to surrender assets is treated ante, § 1856, et seq.

The trustee may be in contempt for failure to file his final account within the time limited by a court order.⁸

§ 2331. **"Wilfully Evasive" or "Flagrantly False" Testimony in Face of Court, Contempt.**—Wilfully evasive or flagrantly false testimony given by a witness in the face of the court is a contempt.⁹

Thus, repetition of "I don't know" and "I don't remember" as to transactions directly within the witness' knowledge and which he must have known, may be contempt of court,¹⁰ and is punishable as a contempt, although also punishable as a crime.¹¹

In *re Bick*, 19 A. B. R. 68, 155 Fed. 908 (D. C. N. Y.): "It is objected on behalf of the petitioner that he has not been charged with misbehavior within the provisions of the U. S. Rev. Stat., § 725. It is true that this word has not been used, but the District Court has found that the petitioner's testimony is false, vague and evasive with the intent of misleading the court and concealing assets of his estate. It is as clear an instance of misbehavior as if the petitioner had refused to testify at all. Mr. Collier's work on Bankruptcy, page 125, is cited as showing that unsatisfactory answers, even if contemptuous, are not contempt in law and cannot be punished as such. If he includes within the category of un-

7. In *re Schulman & Goldstein*, 20 A. B. R. 707, 164 Fed. 440 (D. C. N. Y.).

8. *O'Connor v. Sunseri*, 26 A. B. R. 1, 184 Fed. 712 (C. C. A. Pa.).

9. See ante, § 1851. In *re Fellerman*, 17 A. B. R. 789, 149 Fed. 244 (D. C. N. Y.); In *re Singer*, 23 A. B. R. 28, 174 Fed. 208 (D. C. Pa.); In *re Smith*, 26 A. B. R. 399, 185 Fed. 983 (D. C. N. Y.); In *re Wiesebrock*, 26 A. B. R. 745, 188 Fed. 757 (D. C. N. Y.); In *re Michiels*, 28 A. B. R. 38, 194 Fed. 552 (D. C. N. Y.); In *re Bernstein*, 24 A. B. R. 524 (Ref. N. Y.); In *re Kaplan Bros.*, 32 A. B. R. 305, — Fed. — (C. C. A. Pa.); *United States v. Appel*, 31 A. B. R. 154, 211 Fed. 495 (D. C. N. Y.).

It has been held, competent for the bankruptcy court to compel the petitioning creditors on dismissal of the petition for insufficient proof, to pay the costs and expenses of a receiver appointed therein by order and punishment for contempt for failure to obey

the order. In *re Lavoc*, 15 A. B. R. 293, 142 Fed. 960 (C. C. A. N. Y.). But this seems to be a far stretch of the law.

10. See the same rule in state court supplementary proceedings when repetitions of "I don't know" have continued. *Becker v. Gerlich*, 72 Misc. N. Y. 157; *Shorwitz v. Cominez*, 152 App. Div. (N. Y.) 758.

United States v. Appel, 31 A. B. R. 154, 211 Fed. 495 (D. C. N. Y.).

11. In *re Fellerman*, 17 A. B. R. 789, 149 Fed. 244 (D. C. N. Y.); In *re Kretsch*, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.); *Ex parte Bick*, 19 A. B. R. 68, 155 Fed. 908 (D. C. N. Y.); In *re Cashman*, 21 A. B. R. 284, 168 Fed. 1008 (D. C. N. Y.); *obiter*, In *re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.); In *re Magen & Magen*, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.), reversed in *Magen v. Campbell*, 26 A. B. R. 594, 186 Fed. 675 (C. C. A. Pa.). Compare ante, § 1568.

satisfactory answers such testimony as the petitioner's, I prefer to follow the decision of Hough, J., in the Matter of Fellerman, 17 Am. B. R. 785, 149 Fed. 244."

In re Schulman, 21 A. B. R. 288, 164 Fed. 440, 167 Fed. 237 (D. C. N. Y.): "At first his sole statement was that he had lost money without any statement of how he had lost it. Finally, at the very end of the examination, in answer to his own counsel, he said: 'We sold goods to people, the panic came, and there has been a lot of goods returned, and the goods that were returned had to be sold at a low figure.' All efforts to get him to explain what the transactions were in which money was lost, what goods had been returned, and what goods returned were sold at a low figure entirely failed. To a great many of the questions he replied with the question 'What do you mean?' and it is apparent that in most of those cases he knew what was meant. Although he testified that he could not read or write English, and although it is true that he did not speak English very well, he could understand it and speak it sufficiently for all practical purposes. Whenever his own counsel asked him questions, he comprehended them well enough. On very numerous occasions his reply was the stock answer of the prevaricator, 'I don't remember,' and the whole examination from the beginning to the end is a perfectly transparent case of duplicity, intentional evasion, and refusal to make any explanation of the facts connected with his bankruptcy under the pretense of ignorance and stupidity. The whole attitude of the bankrupt in the entire proceeding is that of contempt of this court, and of its authority, and a deliberate determination to conceal from his creditors all the material facts within his knowledge relating to the affairs of his firm."

In re Schulman, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.): "Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers, 'I don't remember,' and 'what do you mean?' so often given, might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose. The testimony as it appears in the record evinces a deliberate purpose to conceal the truth and prevent the trustee from becoming possessed of facts which would lead to a recovery of the missing property. The witness was being asked regarding transactions directly within his knowledge and facts which he must have known. When, therefore, he answered repeatedly, 'I don't remember,' it is obvious that he was deliberately withholding information to which the trustee was entitled. In effect his attitude was one of defiance. He did not affirmatively tell the referee that he refused to disclose the facts which would enable the trustee to follow the property, although these facts were well known to him, but his conduct produced the same result as if he had stated his purpose openly. * * * He was lawfully summoned to testify and was interrogated as to all of these subjects. He refused to give information which he possessed and sought to evade his duty by pretended ignorance, deceit and falsehood. We think the action of the District Court was fully justified by the facts and that the order should be affirmed."

Obiter, In re Gitkin, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.): "An examination of the testimony taken by the referee convinces me that Gitkin was testifying falsely through nearly the entire examination. It shows a determination to refuse to give the trustee and creditors any information whatever as to the disposition of his property, or to explain how it came about that he was indebted in certain amounts, which, from all the facts and circumstances, were plainly and certainly claims set up for the purpose of further depleting the already dissipated

estate. He pretended to be ignorant of facts which obviously would have been known to any one who had sufficient intellect to perform the most ordinary duties of life, and the evasion and falsity of the answers are so palpable, so clear and so persistent as to establish beyond any possibility of a doubt the findings as reported by the referee. The referee, however, seems to be in doubt as to whether wilful perjury and the giving of testimony in a vague, unsatisfactory, ambiguous and contradictory manner, with the intention of obstructing the administration of justice and preventing the collection and distribution of his property, can be punished as a contempt of court. * * * The fourth subdivision of § 41a requires the bankrupt to appear, to take the oath as a witness, and after having taken the oath to submit to an examination according to law. After having taken the oath, as required, a refusal to answer questions at all would subject the witness to punishment for contempt for a refusal 'to be examined according to law.' If a witness be not allowed to obstruct and hinder the administration of a bankrupt's estate and prevent an ascertainment as to the disposition of his property by refusing to answer questions in connection with these matters, and if it be true that a refusal to answer is violative of the command of the fourth subdivision of § 41a of the Bankruptcy Act, requiring a witness to submit to 'an examination according to law,' can it be said that one who deliberately and willfully makes false answers to all questions propounded thereby as effectually closing the avenues of inquiry as to the bankrupt's estate as if he had refused to answer, has not refused 'to be examined according to law' because he makes answer when his answers are intentionally and plainly false and effects the same result as a refusal to answer at all? It is very plain that where a bankrupt persistently through page after page of his testimony answers 'I don't know' to questions about his property which he must and evidently does know and could make full answers, he refuses 'to be examined according to law' with the same effect as though he refused to make answer at all. An 'examination according to law' requires that questions shall be answered and answered truthfully, and a witness does not satisfy the law by simply making answer which gives absolutely no information whatever in regard to the questions being inquired about, when it is very plain that the witness is entirely competent to give the desired information but is deliberately and wilfully prevaricating in order that the truth may not be discovered. So that it is our judgment that a witness who refuses to answer or makes wilfully false answers and thereby obstructs the prompt and proper administration of the bankrupt law is guilty of contempt and can be punished under § 41b of the act."

In this case the witness continually reiterated "I don't know" to questions the answers to which he obviously must have known, the court, upon the point, saying: "The witness testified that he had borrowed certain sums of money from three different persons, and that at the time he received the last of the sums from each person he noted the amount in a book which he produced at the hearing showing that it was entered therein in June, 1907, and stated he made the entry at that time. An examination of the book shows that it was not published until subsequent to that date, and when the witness' attention was called to this fact, he then said that he had copied it into the book produced at the examination from another book and had thrown the other book away. This is a fair sample of the witness' entire testimony, and is urged by the petitioner to be obviously false, showing wilful and deliberate perjury. There appears page after page of testimony in which the bankrupt pretended not to know the meaning of what he had written in a book only two months before in connection with his business and his customers, and the only response he made to questions in regard to it was 'I don't know.'"

Such false testimony is punishable as a contempt, although also punishable as a crime.

And witnesses other than the bankrupt may be punished for such contempt.¹³

§ 2331½: **Interference with Property in Custody.**—Interference with property in the custody of the bankruptcy court is of course a contempt.¹⁴

Thus, the bankrupt's possession after adjudication (and even after the mere filing of the bankruptcy petition) being the possession of the bankruptcy court, the subsequent removal, concealment, or other disposition of property which was in his possession at the time of the filing of the petition, is an interference with the custody of the bankruptcy court and may be punished as a contempt.¹⁵

Thus, where one aids the bankrupt after adjudication (or even after the mere filing of the bankruptcy petition) to hide property he commits a contempt.¹⁶

Clay v. Waters, 24 A. B. R. 293, 178 Fed. 385 (C. C. A. Mo.): "An adjudication in bankruptcy is a seizure by the court of bankruptcy and a transfer to that court of all property in the possession of the bankrupt at the time of the adjudication in which he has any interest. Thenceforth such property is a part of the trust estate in the legal custody of the court for the benefit of the creditors of the bankrupt and adverse claimants. * * *

"Any willful interference with any of this trust estate, any willful attempt to injure it, to withdraw it from the custody of the court, or to conceal it from the court or any of its officers whose duty it is to administer it, is a defiance of the power and an affront to the dignity of the court, which may be punished by a judgment for contempt. * * *

"The \$40,000 out of which the defendant took the money with which he bought the property the title to which he placed in his name was in the possession of the bankrupt at the time of the adjudication against him. He concealed it from the trustee. The defendant with knowledge of this fact took a portion of it and continued the concealment by putting the title to it in his name, and he thereby became clearly guilty of a contempt of the court below.

"A party to a suit, who knowingly and intentionally disposes of its subject-matter with intent to withdraw it from the jurisdiction of the court and to render futile any future decree concerning it, unavoidably defies the power and affronts the dignity of the court and thereby renders himself liable to punishment for contempt."

And such interference is punishable as contempt even though no injunction be issued.¹⁷

Clay v. Waters, 24 A. B. R. 293, 178 Fed. 385 (C. C. A. Mo.): "The subsequent intentional taking and concealment of property of a bankrupt in his possession at the time of his adjudication by one who then had no lien upon or title or de-

13. In *re Bernstein*, 24 A. B. R. 517 (Ref. N. Y.).

14. In *re Dialogue*, 32 A. B. R. 183, — Fed. — (D. C. N. J.). See instances cited under § 2330; also, compare, In

re Darlington, 20 A. B. R. 805, 163 Fed. 389 (D. C. N. Y.).

15. See ante, § 1923.

16. See ante, § 1923.

17. See ante, § 1923.

batable claim to it is a violation of the injunction against the interference with the bankrupt's property embodied by the settled law of the land in the adjudication and in the legal custody secured by the court and is punishable as a 'contempt of court' under § 725, Rev. St. (U. S. Comp. St. 1901, p. 583).

"The filing of the petition in bankruptcy and the adjudication themselves constitute a caveat and an injunction by the court against any interference with the property of the bankrupt by all persons who have no liens upon, titles, or debatable claims to it at the time the petition is filed, and the taking and disposition of it by any of them violates that injunction."

Replevying property after oral notification of the appointment of a receiver is contempt.

In *re Wilk*, 19 A. B. R. 178, 155 Fed. 943 (D. C. N. Y.): "He told Herman that the receiver had taken possession the day before, and had his lock put on the door; that Herman had no right to enter or interfere with the goods, and that he must not remove any of the goods. Herman said that he did not care for the United States Court, and that he was going to take the goods away under his writ. * * * The marshal's defense to this motion is, in substance, that as no certified copy of the order of injunction and appointing the receiver was duly served upon him he was not obliged to pay any attention to the information which was given to him that an officer of this court was in possession of the property. The rule is well settled that if a person had actual knowledge of the evidence of an order of court he is liable to the consequences of violating it even if he has not been formally served with it (High on Injunctions, § 1422, and cases there cited). * * * An order will be entered adjudging him in contempt and directing, as a punishment for his contempt, that he be committed to the Tombs Prison for sixty days."

The petition, in charging a contempt of this character, must be so framed as to come within the requirements of § 41.¹⁸

§ 2332. Contempt Not in Presence of Court.—The act, in order to constitute contempt, need not be committed in the presence of the court, nor when the court is in session.

Ex parte O'Neal, 11 A. B. R. 196, 125 Fed. 967 (D. C. Fla.): "The charge of contempt against the relator is based upon the fact that he unlawfully assaulted and resisted an officer of the District Court in the execution of orders of the court, and in the performance of the duties of his office under such orders; and in that respect it would seem to be immaterial whether at the time of the resistance the court was actually in session, with a judge present in the district, or whether the place of resistance was 40 or 400 feet from the actual place where the court was usually held, so long as it was not in the actual presence of the court, nor so near thereto as to embarrass the administration of justice."

§ 2333. Advice of Counsel.—Advice of counsel may palliate contempt, but it does not always excuse it.¹⁹

18. *Magen v. Campbell*, 26 A. B. R. 594, 186 Fed. 675 (C. C. A. Pa.), reversing 24 A. B. R. 63.

19. *United States v. Goldstein*, 13 A. B. R. 755, 132 Fed. 789 (D. C. Va.); *In re Stroebel*, 20 A. B. R. 754, 160 Fed. 916 (D. C. N. Y.). Compare, *Clay*

v. Waters (opinion quoted from court below), 24 A. B. R. 293, 178 Fed. 385 (C. C. A. Mo.). *In re Zeigler Co.*, 26 A. B. R. 761, 189 Fed. 259 (D. C. Conn.). Compare, *In re Fogelman*, 30 A. B. R. 348, 204 Fed. 351 (D. C. N. Y.).

In *re Home Discount Co.*, 17 A. B. R. 170, 147 Fed. 538 (D. C. Ala.): "This is not one of the cases in which reliance upon the advice of counsel can shield a party from the consequences of a deliberate disobedience. Here there was a purpose not to perform an act which the order exacted—an order so precise and definite that no man could read it and fail to know what it demanded. Respondent does not claim that it misconstrued the order, or that it did not intend to disobey it. On the contrary, it admits that it knew precisely what the order required and that it did not intend to obey it. It concluded to disobey on the advice of counsel, on the theory that the referee had no authority to make the order and that the court had no power to compel obedience to it before the court itself first passed on the petition for review. Having ability to comply, and having intentionally and designedly disobeyed the order, realizing fully what it enjoined, the company can not be heard to say that it did not intend disobedience to the process of the court. The intent is shown by the act, which speaks for itself. *Agnew v. United States*, 165 U. S. 50. This is not a case where the disobedient party did a forbidden act, honestly, though mistakenly, believing that its conduct was not forbidden by the order, and therefore, although it knowingly did the forbidden thing, yet had not any actual intent to disobey the command. Under such circumstances there is no moral intent to defy the order, though there is disobedience to its command."

However, sometimes it may wholly negative contempt.²⁰

§ 2334. Contempt before Referee, What Constitutes, Defined by Statute.—What constitutes contempt before the referee appears to be defined by the statute in § 41 (a).²¹

Thus, § 41 (a) provides that a person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ;²²

In *re Richards*, 25 A. B. R. 176, 183 Fed. 501 (D. C. Ark.): "The real question left for the court to determine now is whether the bankrupt has it in his power to comply with the order of the referee. It was held in the case of *In re DeGottardi et al.* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 329: 'Where a bankrupt admits having had money or property a short time before his bankruptcy, which is not shown by his schedules, it is incumbent upon him to clearly account for the

²⁰. Instance, *Orr v. Tribble*, 19 A. B. R. 849, 158 Fed. 897 (D. C. Ga.); *In re Darlington*, 20 A. B. R. 805, 163 Fed. 389 (D. C. N. Y.).

²¹. Bankr. Act, § 41 (a): "A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ, (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness or, after having taken the oath, refuse to be examined according to law; provided, that no person shall be required to attend as a witness before a referee at a place outside of the State of his residence,

more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him."

Instance under (1) *In re Geiser*, 12 A. B. R. 208 (D. C. Mont.): Denial by constable of receipt of excess of proceeds of execution sale which he had turned back to the purchaser.

As to contempts of bankrupts for failing to obey orders to surrender property, see ante, subject, "Summary Orders on Bankrupts and Others," § 1856, et seq.

²². As to contempt of bankrupts and others for failing to obey orders to surrender property, see ante, subject, "Summary Orders on Bankrupts and Others," § 1856, et seq.

same to the satisfaction of the court; otherwise, he must be held to still have it in his possession, and to be able to turn it over to his trustee.'

"Had that been the charge, the case would have been much like the Schulman case and possibly the judgment now under review might have stood. But we think the trustee in bankruptcy erred in not framing his petition in bankruptcy in such manner as to state a case of contempt under the 41st section of the Bankruptcy Act. That section sets forth the only authority conferred by the Bankruptcy Act for punishing in contempt for proceedings before a referee."

(2) Misbehave during a hearing or so near the place thereof as to obstruct the same;²³

(3) Neglect to produce, after having been ordered to do so, any pertinent document;²⁴

Or (4) refuse to appear after having been subpoenaed;²⁵ or, upon appearing, refuse to take the oath as a witness; or, after having taken the oath, refuse to be examined according to law.

Thus a bankrupt, guilty of wilfully evasive or flagrantly false testimony in the face of the court, is guilty of "refusing to be examined according to law."²⁶

In *re Schulman*, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.): "Under § 7 of the act it was Schulman's duty to 'submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property.' He was lawfully summoned to testify and was interrogated as to all of these subjects. He refused to give the information which he possessed and sought to evade his duty by pretended ignorance, deceit and falsehood."

However, either some definite order must be disobeyed or obstructive or contemptuous behavior have occurred. Thus, where, before adjudication, it was sought to examine the bankrupt as a witness upon a motion for the appointment of a receiver, to which the bankrupt's attorney objected, the "certificate" of the referee to such facts was held to be insufficient, since it showed no disobedience of any order nor any contemptuous behavior.²⁷ And a lawful order by the referee is a condition precedent to punishment for refusal to obey it.²⁸ Thus, if the charge against a bankrupt guilty of wilfully evasive or flagrantly false testimony in the face of the Court, is framed as if for perjury, rather than for contempt for refusal to be examined according to law, the charge will be insufficient.²⁹

²³. Instance, *Ohio Valley Co. v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio).

²⁴. Instance, *In re Sorkin*, 20 A. B. R. 637, 166 Fed. 831 (D. C. N. Y.). Instance, *In re Hyman J. Herr* (No. 1), 25 A. B. R. 141, 182 Fed. 715 (D. C. Pa.).

²⁵. Instance, *In re Sorkin*, 20 A. B. R. 637, 166 Fed. 831 (D. C. N. Y.).

²⁶. *In re Magen & Magen*, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.), reversed sub nom. *Magen v. Campbell*,

26 A. B. R. 594, 186 Fed. 675 (C. C. A. Pa.), on the ground that the charge was perjury and that the matter had not been presented as if it were a refusal to be examined.

²⁷. *Craddock-Terry v. Kaufman*, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.).
²⁸. *In re Soloway & Katz*, 28 A. B. R. 225, 195 Fed. 100 (D. C. Conn.).

²⁹. *Magen v. Campbell*, 26 A. B. R. 594, 186 Fed. 675 (C. C. A. Pa.), reversing *In re Magen & Magen*, 21 A. B. R. 63, 179 Fed. 572: "The charge, as we

§ 2335. Referee Has No Power to Commit.—The referee has no jurisdiction to punish for contempt.³⁰

§ 2336. Referee Simply to Certify Facts to Judge.—The referee certifies the facts to the judge, if any person shall have committed a contempt before him.³¹

In *re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va., affirmed sub nom. *Bk. v. Johnson*, 16 A. B. R. 209, 143 Fed. 463): "This proposition may be resolved into two heads: (a) his power to determine as to whether contempt exists; (b) his method of procedure. This last presents no difficulty; in fact is well settled. In a case where a referee believes a witness improperly refuses to testify or produce written testimony—in other words, to be in contempt for any reason—it is his plain duty to set forth the contempt upon the record, certifying the facts to the district judge, who will then deal with the question as if the contempt had originally arisen in his court."

And it is necessary that the referee so certify; and the contempt proceedings must not be started before the judge except on the filing of such a certificate.³²

Yet a commitment by the district court without such certificate from the referee is merely irregular and not void for want of jurisdiction; and it may not be attacked collaterally, by habeas corpus.³³

§ 2337. Making of Certificate, Judicial Act, Not Ministerial Duty.—The referee is to judicially determine whether or not a contempt has been committed before certifying the culprit to the judge, and is not obliged to make the certificate unless in his opinion a contempt has been committed.

In *re Romine*, 14 A. B. R. 790, 138 Fed. 837 (D. C. W. Va.): "What shall a referee do in a case like this where his conscience and judgment tell him that the evidence is improper, immaterial and not pertinent, and he has so ruled? Must he nevertheless stop, and certify that a contempt has been committed, which he does not believe to be true, simply because the parties demand it? When the right of protection guaranteed by all courts to a witness is taken into considera-

have seen, was perjury; but the case was presented to the District Court as though it were that the bankrupts had taken the oath and then refused to be examined according to law."

30. Bankr. Act, § 38 (a): "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time with jurisdiction, to * * * (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment."

Bank v. Johnson, 16 A. B. R. 211,

143 Fed. 463 (C. C. A. W. Va., affirming *In re Romine*, 14 A. B. R. 785, 138 Fed. 837); *In re Miller*, 5 A. B. R. 185, 105 Fed. 57 (D. C. Iowa); *In re Harding*, 27 A. B. R. 285, 193 Fed. 168 (D. C. Mich.), affirmed S. C., 29 A. B. R. 387, 203 Fed. 229 (C. C. A. Mich.).

31. Bankr. Act, § 41 (b), *In re Miller*, 5 A. B. R. 184, 105 Fed. 57 (D. C. Iowa); *Bank v. Johnson*, 16 A. B. R. 210, 143 Fed. 463 (C. C. A. W. Va., affirming *In re Romine*, 14 A. B. R. 785, 138 Fed. 837, D. C. W. Va.); *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.).

32. *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.).

33. *Birnbaum v. Henkel*, 26 A. B. R. 199, 185 Fed. 553 (C. C. N. Y.).

tion, I am clearly of the opinion that the referee has a right to and must determine judicially in the first place whether a contempt has been committed, and, if he thinks not, to refuse, no matter how strongly urged, to certify the matter for contempt proceedings to the judge."

§ 2337¼. **Weight of Referee's Findings as to Contempt.**—The referee having had the opportunity to see and hear the bankrupt or other witness and to observe the manner of testifying, his findings in regard to such manner should be of great weight, for the testimony of the witness might sound plausible and respectful when read afterwards from a printed book, and yet his conduct on the stand may have been such that no one observing him could have doubted his wilful and contemptuous behavior.

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. * * * Much, in both cases, must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the Judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the District Judge, whilst scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and a miscarriage of justice."

Epstein v. Steinfeld, 32 A. B. R. 6, 210 Fed. 236 (C. C. A. Pa., affirming In re Epstein, 30 A. B. R. 387, 206 Fed. 568, D. C. Pa.): "The findings of the referee were made by him after he had taken a large amount of conflicting testimony covering every phase of the alleged withholding of property by the bankrupt, and when he had the opportunity to, and did see, the witnesses who testified. His findings, as has been decided over and over again, ought not to be disturbed except where it is demonstrated that a plain mistake has been made. This rule is so forcibly stated in Ohio Valley Bank v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio) by Judge Lurton, that we quote it at some length. * * * "[This case quoted supra this section.]

"It is the rule which has obtained in this circuit, and we again affirm it in order that it may be regarded as settled beyond controversy. The learned judge of the District Court had all the evidence and the findings of the referee before him and he has approved them. We have thus the conclusions of two courts, and they ought not to be disturbed except for a plain mistake which would result in the defeat of justice. We have carefully and thoroughly examined the evidence in this case to determine whether or not the findings of the referee are demonstrated to be clearly erroneous. The evidence which must be considered as the basis of the findings is that of an expert accountant. This accountant had all the books of the bankrupt, which appear to have been regularly kept, and which were stated by the bankrupt under oath to be correct, and he had a statement of assets and liabilities sworn to by the bankrupt on July 5, 1911. His examination covered the period from July 5, 1911, to October 11, 1911, the date of the bankrupt's adjudication. He had also during his investigation

such information as could be obtained from the bankrupt and his employees as to the cost of manufacture. He submitted to the referee a voluminous statement, showing the manner of his examination and how he arrived at his conclusions, and also a summary of his work, showing the conclusions to which he had come. The only attack upon his evidence worthy of consideration is that his account is based upon the inventory or statement of the bankrupt's assets and liabilities, made and sworn to by the bankrupt July 5, 1911, and that this statement incorrectly gives the amount of made-up waists in dozens, whereas the actual count was that of units or single waists. Certain former employees of the bankrupt were called to testify that in making the inventory single waists were counted, the amount written on slips of paper and the price per dozen also stated thereon, and that these slips of paper were given to the bookkeeper for entry in the books, and that the bookkeeper took the statement of the price per dozen as indicating the numbers referred to as dozens, and therefore entered the numbers of single waists as dozens at the price of dozens, and thus made the inventory in that particular show twelve times the value of the goods on hand. The evidence of these witnesses was taken by the referee; and he saw the witnesses and heard them testify. He was better able to judge than we of their truthfulness and to pass upon the value of their evidence. The evidence in itself was conflicting and uncertain. Its comparison with the other evidence in the case as to the manner of taking former inventories, as to the amount of material bought for manufacture, the number of persons employed, the amount paid out for wages and the number of manufactured waists sold, makes the evidence far from clear and convincing. It was peculiarly a case where the referee would be the better judge of its value and persuasiveness, and it emphasizes the wisdom of the rule that his findings ought not ordinarily to be disturbed. We cannot say, after the most thorough consideration of the evidence, that we would have found otherwise, much less do we find that it demonstrates that a plain mistake has been made by the referee."

Impliedly, *In re Schulman*, 23^d A. B. R. 809 (C. C. A. Ala.): "In the case at bar we know nothing of the bankrupt, Schulman, except as he is portrayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers, 'I don't remember,' and 'what do you mean?' so often given, might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose."

However, the findings of the referee are not conclusive, nor binding upon the judge, especially where the case is not one of conflicting evidence, depending upon the credibility of witnesses, but the referee's findings are merely deductions from facts; and, where the district judge has arrived at a different conclusion, his findings will supplant the findings of the referee, and

upon review the appellate court is bound to accept the findings of the district court.^{33a}

In *re Haring*, 29 A. B. R. 387, — Fed. — (C. C. A. Mich., affirming S. C., 27 A. B. R. 285, 193 Fed. 168): "It is to be observed that the referee did not find that \$4,000, in property or money or both, were in the possession or control of the respondent; nor did he find that such sum was concealed or withheld by respondent. Indeed, he expressly found that the account as stated by him showed a net balance due of \$4,000; and from that he deduced the finding before shown. He distinctly refrained from finding whether the bankrupt's failure to keep books of account or records of any kind 'from which the true status of his affairs could be determined,' was 'willful or intentional,' which tends to negative bad faith in respondent. It appears both by the referee's findings and the court's opinion that the referee's statement of the account was in several material respects but an approximation; the findings do not purport to be based solely upon book entries or other controlling data. Surely it was quite as open to the judge, as it was to the referee, to draw inferences and deduce a conclusion from such a source as this. It was not even a case of conflicting evidence, depending upon the credibility of witnesses who were before the referee and not the court. * * * The court, not the referee, was charged with the responsibility of exercising the power of commitment for contempt (*Smith v. Belford* (C. C. A., 6th Cir.), 5 Am. B. R. 291, 106 Fed. 658, 661); and it will not do to say that findings like these operate (if indeed findings of the referee can ever operate) as an estoppel upon the bankruptcy court or otherwise conclude it. * * * The court was not satisfied either that the findings of the referee or the evidence showed the respondent to be in possession or control of the \$4,000; and it would be a harsh rule to attempt to control the action of that tribunal upon any theory of estoppel. * * *

"It is not necessary either to cite or comment on the decisions relied on by the court below, for our review of the present case is restricted to the questions presented by the petition for revision. It is settled that in such a proceeding only questions of law can be determined; and such questions must arise out of the facts found by the court below or admitted by the parties. In *re Stewart* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222, 228; In *re Taft* (C. C. A., 6th Cir.), 13 Am. B. R. 417, 133 Fed. 511, 513; In *re Leech*, supra (at pp. 625, 626); as Mr. Justice Holmes said in *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 302, 25 Am. B. R. 66, 31 Sup. Ct. 25, 54 L. Ed. 1047: 'A petition for revision opens only questions of law.' After all the finding of the referee was practically supplanted by the finding of the bankruptcy court; and, since we are bound in this proceeding to accept the latter finding, it is plain that the order of the court below dismissing the petition of the trustee must be affirmed with costs."

But, in one instance, in the case of a criminal contempt, the principle that a judgment against a person in a civil case sustains none of the issues against the same person in criminal proceedings, has been applied; and, under this rule, while it was held that the proceedings before the referee might be referred to as having some weight, it was also held that they would

^{33a}. Obiter, In *re Magen & Magen*, Magen *v.* Campbell, 26 A. B. R. 594, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa., reversed on other points sub nom. 186 Fed. 675, C. C. A. Pa.).

not justify the district court in failing to revise the questions involved with an open mind in a proceeding to punish for contempt.³⁴

§ 2337½. Entitled to Notice and Hearing before Certificate.—Where the contempt is committed in the face of the court and the referee himself initiates the contempt proceedings, it is probable that notice and further hearing will be unnecessary before the referee makes his certificate. But if the contempt proceedings are begun by a party, then it is essential that the witness or other person be given notice of the application for the certificate, with opportunity to be heard thereon.

In *re Magen & Magen*, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.): "At the trustee's request the referee has certified that the bankrupt's answers upon their examination were manifestly false and evasive, and recommends their punishment for contempt. They did not have notice of the trustee's petition or of the contemplated action thereon, and in this I think the proceeding was erroneous. I see no reason to doubt that the referee may certify such a state of affairs upon his own motion, but if the proceeding is begun by an interested party, the bankrupts are entitled to notice, as of any other action that may affect them personally. The referee exercises a judicial office, and while he cannot himself punish for contempt, he may take the needful preliminary steps to bring the bankrupt's conduct to the attention of the court; and he need not give notice of his intention so to do. The contempt is committed in his presence; and in asking that the court investigate the matter further, he is acting on his official responsibility. The court will then give the bankrupt notice of the proceedings, and will afford him an opportunity to be heard. If, however, the referee does not choose to act upon his own motion, the situation is on a different footing; it is then an ordinary dispute between the party presenting the petition and the bankrupt, and the usual course of notice and a hearing should be followed."

§ 2338. Judge to Hear and Punish, if Contempt Committed.—The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.³⁵

And should the defendant be a fugitive from justice, the proceedings for his punishment may be held open so long as he continues to remain absent.³⁶

³⁴. In *re Goodrich*, 25 A. B. R. 787, 184 Fed. 5 (C. C. A. Mass.).

³⁵. Bankr. Act, § 41 (b). Where the certificate of the referee is accompanied with a verbatim transcript of the testimony a demurrer to the rule will be overruled. *U. S. v. Goldstein*, 12 A. B. R. 755, 132 Fed. 789 (D. C. Va.).

Instance, In *re Richards*, 25 A. B. R. 176, 183 Fed. 501 (D. C. Ark.); instance, In *re Hyman J. Herr* (No. 1), 25 A. B. R. 141, 182 Fed. 715 (D. C. Pa.); instance, In *re Wiesebrock*, 26 A. B. R. 745, 188 Fed. 757 (D. C. N. Y.).

³⁶. In *re Michaels*, 28 A. B. R. 38, 194 Fed. 552 (D. C. N. J.).

§ 2339. Power to Commit, Cautiously Exercised.—The power to punish for contempt is cautiously exercised.³⁷

In *re McCormick*, 3 A. B. R. 340, 97 Fed. 566 (D. C. N. Y.): "As such punishment may involve imprisonment, however, this power should be cautiously exercised, and in cases only where wilful disobedience by the bankrupt is proved beyond reasonable doubt, as in a criminal case."

And the prescribed method for punishing contempts before referees must be strictly followed.

In *re Gitkins*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.): "This section makes it plain that the power to commit for contempt before a referee was not conferred upon the latter but was conferred on the judge of the court of bankruptcy before whom the matter must be certified in accordance with its provisions; and in order that the court may take cognizance of the offense and punish the offender, he must be proceeded against strictly in accordance with the mode pointed out by the Bankruptcy Act, and any deviation from that procedure the bankrupt may take advantage of on a motion to dismiss the proceedings. The statutory procedure being full and complete must be strictly followed, and a failure to do so will be fatal."

§ 2340. Evidence to Be beyond Reasonable Doubt.—The evidence should be beyond reasonable doubt.³⁸

§ 2341. No Punishment for Failure to Comply with Order until Opportunity Given to Show Inability.—A bankrupt should not be punished for contempt because of his failure to comply with an order of the court before he is given an opportunity to prove his inability to do so.³⁹

Punishment will not be inflicted where the court seriously doubts the ability of the contemnor to comply with the order.⁴⁰

§ 2341¼. Whether Original Evidence on Order to Surrender Assets Re-Examined on Contempt for Disobedience of Order.—Although some decisions seem to indicate the contrary, it is on principle and

³⁷. In *re Mayer*, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.); In *re Romine*, 14 A. B. R. 790, 138 Fed. 837 (D. C. Wis.).

But compare, In *re Lavoc*, 15 A. B. R. 293 (C. C. A. N. Y.), where the circuit court of appeals upheld the right of the lower court to compel by punishment for contempt the payment of costs by the petitioning creditors upon dismissal of the petition for failure to prove same.

See ante, § 1840. In *re Haring*, 27 A. B. R. 285, 193 Fed. 168 (D. C. Mich. affirmed sub nom. 29 A. B. R. 387, 203 Fed. 229 (C. C. A. Mich.).

³⁸. See ante, §§ 1842, 1859. In *re Romine*, 14 A. B. R. 790, 138 Fed. 837 (D. C. W. Va.); In *re McCormick*, 3 A. B. R. 340, 97 Fed. 566 (D. C. N. Y.), quoted at § 2339; *Stuart v. Reynolds*, 29

A. B. R. 412, 204 Fed. 709 (C. C. A. Ala.), quoted at §§ 1841, 1843, and 1845; *Kirsner v. Taliaferro*, 29 A. B. R. 832, 202 Fed. 51 (C. C. A. Va.).

³⁹. Compare ante, §§ 1845, 1856, 1857, 1858. In *re Hausman*, 10 A. B. R. 64, 121 Fed. 984 (C. C. A. N. Y.); instance, In *re Richards*, 25 A. B. R. 176, 183 Fed. 501 (D. C. Ark.); *Stuart v. Reynolds*, 29 A. B. R. 412, 204 Fed. 709 (C. C. A. Ala.), quoted at §§ 1841, 1843 and 1845.

But a naked denial of ability is not sufficient. In *re Kramer and Muchnick*, 31 A. B. R. 525, 210 Fed. 977 (D. C. Pa.); In *re Weber*, 29 A. B. R. 217, 200 Fed. 404 (C. C. A. N. Y.); In *re Cummings* (2), 26 A. B. R. 130, 186 Fed. 1020 (D. C. Pa.).

⁴⁰. In *re Soloway & Katz*, 28 A. B. R. 345, 195 Fed. 100 (D. C. Conn.).

by the weight of well-considered authority directly on the point, undoubtedly the true rule that, on contempt for disobedience of an order to surrender assets, the evidence on which the original order was based is not to be re-examined—for the way to correct erroneous orders for surrender of assets “is by appeal, not by disobedience.” This subject is discussed fully at § 1857.

§ 2341¾. **Conditional Order of Commitment.**—Where the judge, in approving the referee’s certificate on contempt, makes a conditional order of commitment, giving further time for obedience, the original contempt may be so commuted as to necessitate new or supplemental proceedings to cover the additional time and dismissal of the original proceedings.⁴¹

§ 2341½. **Purging from Contempt.**—The ordinary rules with reference to purging from contempt doubtless obtain in bankruptcy.⁴²

Thus, it has been held that in cases where the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he should be regarded as having purged his contempt, unless injury has occurred or the case be exceptional.

In *re Gordon*, 21 A. B. R. 290, 167 Fed. 239 (D. C. N. Y.): “But there is another ground upon which I prefer to put my decision in this case, and that is the importance of not discouraging bankrupts who have given false testimony from afterwards admitting the truth. Almost every bankrupt who has intentionally concealed his property before bankruptcy concocts a false explanation and, when he is examined, at first gives false testimony in support of such fabricated explanation. Like all false evidence, however, such testimony usually will not stand the test of thorough cross-examination by a competent lawyer. It frequently happens that a bankrupt, after cross-examination has exposed the improbability or absurdity of the evidence given, would be willing to confess the truth if he were not afraid of the consequences of the false evidence that he has given. In such cases, he must take the chances of a prosecution for perjury, but, so far as the charge of contempt is concerned, I think that he should be regarded as having purged his contempt if he has, at any time in the course of his examination, given such full and truthful information concerning his estate as the creditors have a right to require. I think, therefore, as a general rule, that, in cases in which the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he ought not to be punished for contempt. In exceptional cases, or in cases where the recantation does not take place until adjourned dates and, in the meanwhile, because of his false testimony any injury has happened to the estate, a different conclusion may be reached.”

41. Impliedly, and in effect, *O’Conor v. Sunseri*, 26 A. B. R. 1, 184 Fed. 712 (C. C. A. Pa.), but in this case the review proceedings were instituted before the expiration of the extended time.

42. Compare, *In re Wiesebrock*, 26 A. B. R. 745, 188 Fed. 757 (D. C. N. Y.); *In re Farkas*, 30 A. B. R. 337, 204 Fed. 343 (D. C. N. Y.).

§ 2342. **Review of Refusal to Certify.**—Any party aggrieved by the referee's refusal to certify a person for contempt has his remedy by petition for review, as in other cases.⁴⁴

§ 2343. **Not Reviewable by Habeas Corpus.**—The action of the district court in contempt matters is not reviewable by the Circuit Court on habeas corpus.⁴⁵

§ 2344. **Order of District Judge Not Reversed Except for Clear Error.**—On review by the circuit court of appeals the district judge's order will not be reversed, except upon clear proof of error.⁴⁶

§ 2344½. **Whilst in Contempt Not to Be Heard.**—The general rule is that one who is in contempt is neither to be heard by motion or otherwise until he has cleared his contempt.

But the rule applies to matters of favor, and a party, although adjudged in contempt, may be heard in matters of strict right, such as the right to a review or appeal of the order adjudging a contempt to have been committed.⁴⁷

§ 2344¾. **Discharge from Custody.**—It has been held that punishment for contempt for noncompliance with an order to turn over assets will not be carried to an extent which would make it, in effect, imprisonment for debt, and that where one confined for such contempt shows that it is impossible for him to obey the order, and it appears that it is not likely that he will be able to do so, his further confinement would be unlawful and his discharge from custody should be ordered.⁴⁸ But such imprisonment could not have arisen had the court originally adhered to the rule requiring convincing evidence of present ability to comply with an order to surrender before making such order; nor had the court which made the

44. *Obiter*, in *re Romine*, 14 A. B. R. 791, 138 Fed. 837 (D. C. W. Va.).

45. *Ex parte O'Neal*, 11 A. B. R. 196, 125 Fed. 967 (D. C. Fla.); in *re Bick*, 19 A. B. R. 68, 155 Fed. 908 (C. C. A. N. Y.). Compare, analogous proposition, *Peters v. U. S. ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing U. S. ex rel. *Kelly v. Peters*, 22 A. B. R. 177, 166 Fed. 613).

United States, ex rel. Birnbaum v. Henkel, 26 A. B. R. 199, 185 Fed. 553 (U. S. C. C. N. Y.).

Review of Contempt Orders.—For this subject, see post, § 2879¼.

46. In *re Levy & Co.*, 15 A. B. R. 166 (C. C. A.).

No Right to Jury Trial.—In *re Bick*, 19 A. B. R. 68, 155 Fed. 908 (U. S. C. C. N. Y.).

Commitment Not Void because Not Running in Name of United States.—*Muller v. Nugent*, 7 A. B. R. 224, 184 U. S. 1.

Whether Judgment to Recite Acts Constituting the Contempt.—It is not indispensable to the validity of a judgment for contempt of court that it should recite the acts constituting the contempt where they are alleged in the petition for the judgment and are admitted by the answer and the judgment is that the defendant is "adjudged to stand in contempt of this court as alleged in the petition." *Clay v. Waters*, 24 A. B. R. 293, 178 Fed. 385 (C. C. A. Mo.).

47. (*Exploration*) *Mercantile Co. v. Hardware & Steel Co.*, 24 A. B. R. 216, 177 Fed. 825 (C. C. A. Nev.).

48. Compare ante, § 1841; also see *In re Cummings*, 26 A. B. R. 477, 186 Fed. 1020 (D. C. Pa.); *In re Taylor*, 7 A. B. R. 410, 114 Fed. 607 (D. C. Colo.); *In re Tudor*, 4 A. B. R. 78, 100 Fed. 796 (D. C. Colo.).

commitment for contempt adhered to the rule that where present ability to comply with the order is not proved the commitment, if at all, should be for a definite term, as in criminal contempts, for disobedience of an order where ability to comply with the order need not be shown.⁴⁹

⁴⁹. Compare ante, §§ 1841 and 2330¹/₈.

PART IX.

COMPOSITION WITH CREDITORS.

CHAPTER XLV.

NATURE AND EFFECT OF COMPOSITION.

Synopsis of Chapter.

- § 2345. Composition Simply Different Method of Administering Estate and Realizing on Same for Creditors.
- § 2346. Effect of Composition, in General.
- § 2347. Composition Restores Estate to Debtor.
- § 2348. Pendency of Petition for Confirmation Suspends Sale and Distribution of Assets.
- § 2349. Confirmation of Composition in Effect a Discharge.
- § 2350. Release of Debts Is by Operation of Law and Not by Consent.
- § 2350½. Revival of Debt in Composition Cases.
- § 2351. Claims "Provable," Though Not Actually "Proved," Discharged.
- § 2352. But Must Be "Duly Scheduled."
- § 2353. "Duly Scheduled"—As to Time—Different in Composition from What It Is in Discharge.
- § 2354. Right to Composition and Effect of Composition, Distinct.
- § 2354¼. Compositions before Bankruptcy.
- § 2354½. Constitutionality of Compositions before Adjudication.

§ 2345. **Composition Simply Different Method of Administering Estate and Realizing on Same for Creditors.**—We have thus far been considering the usual course of administration of a bankrupt estate. We have traced it from the beginning through its different steps, ending with the distribution of the assets and the winding up of the case. Sometimes, however, the bankruptcy case does not take this course. It is possible for a bankrupt to lift the estate out of the bankruptcy court and to resume the charge and ownership of it, freed from the claims of his creditors. This is accomplished by the bankrupt making a "composition" with his creditors.

Compare, remarks, U. S. ex rel. *Adler v. Hammond*, 4 A. B. R. 738 (C. C. A. Tenn.): "The law prescribes that after he has been adjudged a bankrupt, has been examined, and has filed a schedule of his property and a list of his creditors, two methods of procedure are open, each of which is designed to accomplish the ends intended by the act. One of these is by the tendering of a certain sum to his creditors by the debtor in lieu of the amount which might ultimately be gathered from the assets and their acceptance thereof. Obviously this amount is contemplated as a sum which will be the equivalent of the assets which would be obtained by the other and more tedious course, for the creditors have the right to reject it. If they accept it, their object is satisfied, and it only remains to execute the purpose toward the bankrupt. This is done by the confirmation of the composition by the court, which is required to see that the nonassenting creditors are not wronged thereby; and the law declares that the confirmation shall have the effect to release or discharge the bankrupt. If this course is not pursued, or proves abortive, the proceeding advances by the other method. The assets in specie are turned over to the trustee, who collects and converts them into money, and that is distributed to the creditors,

who then get that which they would have reached by the former course, more or less, as it may turn out. Then, because the record does not show any formal declaration of the right of the bankrupt to be released, it is provided that he may obtain an order declaring that right. It is to be noted that the court is charged with the same duty whether it is sitting to determine whether a composition should be confirmed as where it is considering the propriety of a formal discharge, namely, to ascertain whether the conditions which the law prescribes have been complied with. This general survey may conduce somewhat to a clearer apprehension of the significance and essential character of the provisions with which we have to deal. The act provides an appeal from a judgment which grants or denies a discharge."

In *re Fox*, 6 A. B. R. 529 (Ref. Ohio, affirmed by D. C.): "The true theory is that the confirmation of a composition, whilst operating on the one hand to discharge the bankrupts from their obligations and to revest them with the title to the estate, operates on the other hand to substitute the funds on deposit in the place of the estate, the only change being that the substituted fund is thereupon to be distributed as the judge may specially direct rather than in accordance with the usual procedure in the disbursement of the dividends."

Composition is treated, even in the Act, as in some respects outside of bankruptcy.¹

In *re Lane*, 11 A. B. R. 137, 125 Fed. 772 (D. C. Mass.): "Section 12 (e) * * * provides, '* * * whenever a composition is not confirmed the estate shall be administered in bankruptcy as herein provided.' Composition is thus treated, even in the act, as in some respects outside of bankruptcy."

This statutory composition is quite different from a settlement and dismissal of the proceedings.

§ 2346. Effect of Composition, in General.—A composition restores the estate to the bankrupt, frees him from all his debts provable and dischargeable in bankruptcy, and distributes among his creditors the amount the bankrupt is required thereby to pay for the ransom of his estate. The money deposited takes the place of the estate.²

§ 2347. Composition Restores Estate to Debtor.—The composition restores the estate to the debtor and revests in him the title thereto.³

1. Bankr. Act, § 12 (e): "Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

2. *Bracklee Co. v. O'Connor*, 24 A. B. R. 499 (N. Y. Sup. Ct.).

3. Bankr. Act, § 70 (f): "Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him." Impliedly and obiter, In *re Becker*, 15 A. B. R. 231, 139 Fed. 366 (D. C. Pa.).

Bankr. Act, § 21 (g): "A certified copy of an order confirming a composition shall constitute evidence of the reverting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart."

McDonald v. Taylor & Co., 26 A. B. R. 635, 144 App. Div. N. Y. 329, which was a suit to recover securities held by a creditor who participated in composition proceedings.

Bracklee Co. v. O'Connor, 24 A. B. R. 499 (N. Y. Sup. Ct.), quoted in this same section.

Stone v. Jenkins, 4 A. B. R. 568, 176 Mass. 544: "The only question which has been argued before us is the right of the plaintiff to maintain the action after he was discharged as trustee and the estate was closed up and settled. * * * When the right of action accrued, Morris had been adjudged bankrupt, and upon the appointment of the plaintiff as trustee the right of action vested in him, and suit was properly brought in his own name. When the offer of composition was confirmed, and the order made discharging the trustee, and closing up the estate, the property in the trustee's hands, including choses in action belonging to the bankrupt estate, vested, by force of the statute, in Morris. Bankr. Act, 1898, § 70."

In re Rider, 3 A. B. R. 179, 96 Fed. 808 (D. C. N. Y.): "The effect of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors."

Gordon v. Mech. & Traders Ins. Co., 22 A. B. R. 649, 120 La. Ann. 441, 45 So. 384: "The creditors made a composition with the debtor which was confirmed by the court. The effect of this was to place matters quoad the property covered by the policy as if it had never been tendered to the creditors."

Suits begun by the trustee, which the bankrupt might have instituted had there been no bankruptcy, are not abated by the confirmation of the composition, but the title to the right of action reverts in the bankrupt.⁴

Stone, as Trustee, v. Jenkins, 4 A. B. R. 568, 176 Mass. 544, 57 N. E. 1001: "We have, therefore, a case in which the right of action was in the trustee when the suit was begun, but has become vested during the pendency of the action in the bankrupt. In such a case it would seem to follow, either that the trustee should be allowed, with the consent of the bankrupt, to prosecute the action for his benefit, or the bankrupt should be allowed to come in and prosecute it in the name of the trustee on such terms as the court might deem reasonable; or the suit should be amended so that the action should proceed thenceforward in the bankrupt's name. If neither one of these things was done, there would seem to be no good reason why a discontinuance should not be ordered. *Cutts v. Parsons*, 2 Mass. 440. But it would serve no useful purpose to compel the plaintiff to discontinue, and to oblige the bankrupt to bring an action in his own name, and such a rule might enable the defendant, under some circumstances, though not, perhaps, in this case, to interpose as a defense the statute of limitations, or some technical matter which he could not otherwise have availed of. In *Mayhew v. Pentecost*, 129 Mass. 332, it was held that an action to recover a debt due before his bankruptcy might be brought by the bankrupt after the bankruptcy, with the consent and for the benefit of the assignee in bankruptcy. E converso, we do not see why an action duly brought by an assignee or trustee in bankruptcy may not be maintained in his name, with his consent, by the bankrupt, for his benefit, after the cause of action has become vested in him, or may not be so maintained by the assignee or trustee with the consent of the bankrupt."

The debtor re-takes his estate, not necessarily in the same condition as when he parted with it, but with whatever changes may have occurred in the meanwhile.

Thus, it as been held that he succeeds to all property rights which the

4. *Obiter*, In *re Becker Bros.*, 15 A. B. R. 231 (D. C. Pa.).

receiver or trustee had acquired in the meantime, as, for example, a lease made by the trustee in the meantime.

Bracklee Co. v. O'Connor, 24 A. B. R. 499 (N. Y. Sup. Ct.): "These sections clearly provide for the revesting of title to all his property in the bankrupt upon the confirmation of the composition agreement without any further act by the trustee or by the court. The defendant, however, claims that this does not transfer any rights to the contract which was made by the trustee and never was part of the bankrupt's property, and that all rights originally accruing to the trustee remain the trustee's until his discharge. I do not think that the Bankruptcy Law is open to this construction. An examination of the various sections, it seems to me, discloses an intent to vest title in the trustee upon his appointment to all the bankrupt's property, except property exempted or not transferable by the bankrupt, but only for the purpose of distribution to the creditors; and since before the confirmation of the composition the bankrupt must deposit subject to the order of the judge 'the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings' (§ 12[b]), the amount so deposited takes the place of the bankrupt's estate and the entire estate, its accretions and proceeds revert in the bankrupt. By force of the confirmation of the composition the bankrupt obtains title not only to the dredge which was previously his but to all the rights under the contract for the lease of the dredge. The whole intent of the composition is to place in the bankrupt's hands all the assets which the trustee has held for the benefit of the creditors and which form part of the bankrupt's estate, whether they belonged originally to the bankrupt or accrued to the trustee. It is quite immaterial whether the trustee has or has not been discharged, for, by the deposit of the consideration for the composition and the confirmation of the composition, he has ceased to have any control of the bankrupt's estate and even his fees are to be paid out of the amount deposited and not out of the estate."

§ 2348. Pendency of Petition for Confirmation Suspends Sale and Distribution of Assets.—The pendency of the petition for confirmation of a composition undoubtedly suspends all proceedings for the sale or distribution of the assets, since the very object of a composition is to restore the estate to its original owner.

However, it has been held, in one case, that if the confirmation proceedings are unreasonably delayed, or the bankrupt is failing to make the requisite deposit, it may not be improper to order sale and distribution of the assets.⁵ Nevertheless, the better practice would be first to dismiss the petition for confirmation of the composition. If the neglect would not warrant a dismissal of the petition for want of prosecution, it would not warrant a disregard of it.

The Amendment of 1910, permitting compositions before adjudication in bankruptcy, specifically provides that action upon the petition for adjudication shall be delayed until it shall be determined whether a composition shall be confirmed.⁶

5. *In re Fisher & Co.*, 14 A. B. R. 366, 135 Fed. 223 (D. C. N. J.).

6. Bankr. Act, § 12 (a), as amended in 1910: " * * * In compositions before adjudication * * * action

And the court at all times has jurisdiction to determine the ownership of property in its custody and claimed adversely^{6a}

Indeed, an adverse claimant is entitled to have the bankruptcy court pass upon his rights, and such responsibility can not be shifted by turning the property over to the bankrupt upon confirmation of the composition.⁷

§ 2349. Confirmation of Composition in Effect a Discharge.—The confirmation of a composition is in effect a discharge.⁸

In re Friend, 13 A. B. R. 597, 134 Fed. 778 (C. C. A. Ills.): "By virtue of § 14 (c) a, * * * a judgment confirming a composition is a judgment granting a discharge."

U. S. ex rel Adler v. Hammond, 4 A. B. R. 736, 104 Fed. 862 (C. C. A. Tenn.): "The one 'discharge' is the equivalent of the other for the purposes of the act, and both are covered by the same section of the act (14), which relates solely to that subject. Moreover, it is to be observed that in both methods, the procedure is under the control of the judge. In the case of a composition, the nonassenting creditors are given the opportunity to contest the confirmation which is to operate as a discharge. It is against that consequence that the contest is directed. It is made because the nonassenting creditors are not satisfied that their claims shall be discharged by the payment of the amount tendered. Questions as important perhaps as any that may occur in bankruptcy proceedings may arise upon the hearing. If the composition is confirmed, the contesting creditors are cut off from any further consideration of the fact unless they can appeal. And so of the bankrupt; whichever way the decision goes, it is the end of that endeavor of the debtor and the creditors to close the matter."

Ross v. Saunders, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.): "It is true that under the present act the action on the composition, if confirmed, operates to discharge the bankrupt from all his debts except those otherwise specified; and in this particular the statute is unlike the earlier ones. Therefore it may well be said that now the confirming or the refusing to confirm a composition constitutes a 'judgment granting or denying a discharge,' as the case may be, and that either comes within the general letter of the provision for appeals."

In re Ullman, 24 A. B. R. 755, 180 Fed. 944 (D. C. N. Y.): "A composition is at once a settlement and a discharge."

In re Jersey Island Packing Co., 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.): "As long as the order confirming the composition stands, it must have the effect given it by subdivision 'c,' § 14, of the Bankruptcy Act, viz., the dis-

upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

6a. In re J. C. Winship Co., 9 A. B. R. 641, 120 Fed. 93 (C. C. A. Ills.). See post, § 2398.

7. In re Cadenas & Coe, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.), quoted at § 2398.

8. Bankr. Act, § 14 (c): "The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

In re Rider, 3 A. B. R. 178, 90 Fed.

808 (D. C. N. Y.); Mandell & Co. v. Levy, 14 A. B. R. 549, 47 Misc. Rep. N. Y. 147; In re Eisenberg, 16 A. B. R. 777 (D. C. N. Y.); [1867] In re Bocket, Fed. Cases No. 1,210; [1867] In re Merriman, Fed. Cases No. 9,479, 18 N. B. Reg. 411; Broadway Trust Co. v. Manheim, 14 A. B. R. 122, 45 Misc. Rep. N. Y. 415; Wilot v. Mudge, 103 U. S. 217; inferentially, In re Jersey Island Packing Co., 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.); Abbott v. Anderson, 31 A. B. R. 877, — Ills. — (App. Ct.); In re Wilkins, 27 A. B. R. 235, 191 Fed. 94 (D. C. N. Y.).

charge of the bankrupt from his debts, 'other than those agreed to be paid by the terms of the composition and those not affected by a discharge,' and the order of confirmation can only be set aside within the time limited by § 13 of the Bankruptcy Act."

Rubber Tire Co. v. Equipment Co., 19 A. B. R. 862, 121 App. Div. 764, 106 N. Y. Supp. 599: "A composition in bankruptcy may be pleaded in bar of an action upon a debt discharged, and in order to be available as a defense, it must be so pleaded."

Glover Grocery Co. v. Dorne, 8 A. B. R. 702, 116 Ga. 216: "Under §§ 12 and 14 of the Bankrupt Act of 1898, the confirmation of a composition proposed by a bankrupt to his creditors, followed by a dismissal of the case, has the effect of discharging him from all ordinary claims provable in bankruptcy, though the holders thereof did not actually prove the same, and consequently did not participate with the other creditors in taking action upon the composition when offered."

And the confirmation or refusal of confirmation is reviewable in the same manner as discharge,⁹ except a refusal based not on the ground that an act barring discharge had been committed but on the ground that the composition would not be "for the best interests of creditors."^{9a} Confirmation of a composition, indeed, may be proved under an allegation of "discharge."¹⁰ And in code states, where jurisdiction to render judgment is sufficiently pleaded by pleading the judgment to have been "duly" made, it is sufficient to plead that the discharge by way of composition was "duly" made. The order of confirmation is sufficiently proved by a certified copy thereof.¹¹ And an order confirming a composition may not be attacked collaterally.¹²

But the confirmation of a partnership composition will not prevent a creditor holding a joint and several obligation, from further participation in the individual estate of the bankrupt partner as to whom no composition has been effected.

In *re Coe*, 22 A. B. R. 384, 169 Fed. 1002 (D. C. N. Y. affirmed in 26 A. B. R. 353, 183 Fed. 745, C. C. A. N. Y.): "For such misappropriation Cadenas & Coe were liable jointly and severally, and upon their bankruptcy the bank could file a double proof, both against the partnership assets and against the individual assets of each partner. * * * It is claimed by the counsel for the trustee that the receipt of the dividend under the composition was an election to treat the indebtedness as a simple contract indebtedness of the firm on the acceptances, but I cannot see that the doctrine of election has any application here. The bank could have originally put in a double proof, against the firm assets and against the individual assets of each partner. As the composition in terms did not propose to make any arrangement for the settlement of the individual indebtedness of Coe, no occasion arose for the exercise of an election, if the doctrine of election applies to such a case at all. * * * As the composition did not purport to settle any questions of the individual liability of Coe, whatever rights the bank had as against his individual estate remained unaffected."

9. In *re Friend*, 13 A. B. R. 597, 134 Fed. 778 (C. C. A. Ills.).

9a. Section 2896, et seq.

10. *Mandell & Co. v. Levy*, 14 A. B. R. 549, 47 Misc. Rep. N. Y. 147; *Broad-*

way Trust Co. v. Manheim, 14 A. B. R. 122, 47 Misc. Rep. N. Y. 415.

11. *Mandell & Co. v. Levy*, 14 A. B. R. 549, 47 Misc. Rep. N. Y. 147.

12. *Abbott v. Anderson*, 31 A. B. R. 877, — Ill. — (App. Ct.).

The individual composition of a partner cannot be effected without the consent of the majority in number and amount of his individual creditors, and merely the consent of his firm creditors will not suffice even though the firm creditors who consent be more than a majority in number and amount of all creditors, firm and individual.¹³

§ 2350. Release of Debts Is by Operation of Law and Not by Consent.—The release effected by a composition is a release by operation of law and not by mutual consent.¹⁴

In *re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.): "A law which compels a creditor, against his will, to accept in discharge of his debt just what the debtor sees fit to offer, should be strictly construed."

The idea of compositions with creditors is familiar. In its ordinary form it rests upon mutual consent and valuable consideration. But a composition in bankruptcy is different. A composition in bankruptcy restores the estate to the debtor and frees him from his debts, to be sure, but not by virtue of mutual consent nor contract, but by operation of law. This distinction is of great importance in practice when it comes to considering the obligations of guarantors and sureties of debts owed by bankrupts. Were the composition a voluntary release, it might release the guarantor or surety; being by operation of law, however, it would not have that effect, even if the statute did not provide in § 16 that

"The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

In one case it was held by a referee that if the creditor be one of those whose consent went to make up the requisite majority entitling the bankrupt to file his petition for confirmation, the surety would be released, since, in that instance, his own voluntary consent had contributed to the discharge.¹⁵ But this doctrine has been squarely repudiated by the Appellate Division of the Supreme Court of New York, the court holding that the active participation of the creditor in the obtaining of the consents makes no difference.¹⁶ The release is effected by operation of law and not by the consent of the creditor.

§ 2350½. Revival of Debt in Composition Cases.—The bar of the discharge in composition cases may be waived in the same manner as in

13. In *re Ullman*, 24 A. B. R. 755, 180 Fed. 944 (D. C. N. Y.); [1867], *obiter*, In *re Spades*, Fed. Cas. No. 13,196.

14. In *re Jersey Island Packing Co.*, 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.); *Easton Fur Mfg. Co. v. Caminez*, 27 A. B. R. 29, 147 N. Y. App. Div. 904; *Cohen v. Lachenmaier*, 27 A. B. R. 416, 147 Wis. 649.

15. In *re Benedict*, 18 A. B. R. 604 (Ref. N. Y.), quoted at § 1513½. Compare suggestively, *Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.).

16. [*Easton*] *Furniture Company v. Caminez*, 27 A. B. R. 29, 131 N. Y. Supp. 157, 146 App. Div. 436, citing *Mason & Hamlin Organ Co. v. Bancroft*, 1 Abb. N. C. 415; *Guild v. Butler*, 122 Mass. 498.

other cases of discharge.¹⁷

§ 2351. **Claims "Provable," Though Not Actually "Proved," Discharged.**—Claims that are provable, although not actually proved, are discharged by the composition, if duly scheduled.¹⁸

§ 2352. **But Must Be "Duly Scheduled."**—But where claims are not "duly scheduled" they are not discharged,¹⁹ unless the creditor had actual notice of the pendency of the bankruptcy proceedings in time.

§ 2353. **"Duly Scheduled"—As to Time—Different in Composition from What It Is in Discharge.**—"Due" scheduling is different in composition matters from what it is in discharge matters, so far as time and notice are concerned; for a claim may be "duly scheduled," so far as discharge is concerned, if the creditor gets notice in time to prove his claim to participate in dividends and oppose discharge; but not so in compositions, for in compositions an additional right exists to participate in the original acceptance or rejection of the proposed composition.

Broadway Trust Co. v. Manheim, 14 A. B. R. 122, 47 Misc. N. Y. 415: "In the case of discharge in bankruptcy as distinguished from a composition it might be the case that if such knowledge were acquired in time to enable the creditor to prove his claim and have it allowed, to participate in the dividends of the bankrupt estate, or to be heard in opposition to the application for discharge, it would be sufficient. *Fider v. Manheim*, 81 N. W. 2. But in the case of a composition agreement it seems to me a different rule should apply. I think the unscheduled creditor should have notice or actual knowledge of the bankruptcy proceeding prior to the time when the application for the confirmation of the composition agreement is filed. Before such application can be filed, the proposed agreement must be accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims. Bankruptcy Act, § 12. In this case the first of the notes sued upon matured June 11, 1904, and the second July 11, 1904, and plaintiff's actual knowledge of defendant's bankruptcy proceedings was subsequent to the latter date. But the defendant was adjudicated a bankrupt on April 11, 1904, and prior to May 4, 1904, he had obtained the consent of a majority of the creditors whose claims had been allowed and approved, and on that day he filed his application for a confirmation of the composition agreement. If the plaintiff had had knowledge or notice of the proceedings prior to that time it might have proved its claim and withheld its consent from the proposed composition and prevented the bankrupt from obtaining the required majority. Since the proceeding compels dissenting creditors to accept the percentage accepted by the majority and deprives them of their remedies on the balance thereafter, this section of the Bankruptcy Act should be strictly construed. *Collier on Bankruptcy* (5th Ed.), 214; *In re Monroe*, 7 Am. B. R.

17. *Cohen v. Lachenmaier*, 27 A. B. R. 416, 147 Wis. 649; impliedly, *Mandel & Co. v. Levy*, 14 A. B. R. 549 (N. Y. Sup. Ct.). Compare post, § 2714, et seq.

18. *Glover Grocery Co. v. Dorn*, 8 A. B. R. 702, 116 Ga. 216.

19. *Broadway Trust Co. v. Manheim*, 14 A. B. R. 122, 47 Misc. N. Y. 415; impliedly, *In re Ennis & Stoppani*, 25 A. B. R. 383, 183 Fed. 859 (D. C. N. Y.).

706. The knowledge of the plaintiff came too late to enable it to 'have an equal opportunity with other creditors' in participating 'in the administration of the affairs of the estate.' The fault was the fault of the defendant in not properly preparing his schedules as to the name of the creditor, or in failing to amend the same after he had learned who the real owner of the debt was. I think the order of the bankruptcy court confirming the proposed composition, so far as the plaintiff is concerned, is inoperative, and affords no defense to the action."

§ 2354. Right to Composition and Effect of Composition, Distinct.—The right to a composition and the effect of it are distinct propositions.²⁰

§ 2354½. Compositions before Bankruptcy.—Frequently debtors endeavor to make compositions out of court before bankruptcy. Indeed, one of the collateral benefits of the Bankruptcy Law is that it enables debtors and creditors to adjust their mutual affairs amicably, without any court proceedings.²¹

In accomplishing such object, however, many questions are likely to arise where bankruptcy subsequently follows.

Thus, it has been held that the signing of a liquidation agreement is not per se a waiver of security theretofore given to the creditor.

In *re Cyclopean Co.*, 21 A. B. R. 679, 167 Fed. 971 (C. C. A. N. Y.): "The principal question is whether Rivenburg released his security. That he should have done so seems incredible when we consider the motives which govern human conduct. He was a clear-headed, careful, prudent business man. His agreement with the company of June 4th proves this beyond peradventure. He had come to the assistance of the company when it was in sore need of help, he had lent his money with the distinct understanding that every dollar should be secured by an account or bill receivable of the company. Ten months afterwards he had advanced for its benefit, in round numbers, \$10,000 and held security therefor, which, for aught that appears to the contrary, was perfectly valid and sufficient to satisfy the loan. It is an almost unthinkable proposition that a sane man would, without consideration, obligation or advantage of any kind, relinquish his right to \$10,000. The company and its creditors already had the benefit of Rivenburg's \$10,000. He had, in effect, discounted the company's paper to that amount. If then the avails of these securities are to be taken from Rivenburg, or his assigns, and handed to the creditors, the practical result will be that the creditors will have received \$20,000 and Rivenburg's \$10,000 will be a total loss except for the percentage he may obtain in dividends. The contention of the trustee leads to such inequitable results that it fails to satisfy the conscience of the court. The only act of Rivenburg on which the release of the security is based is the signing by him of the liquidation agreement. * * * The signature in blank is perfectly consistent with the theory that it was only intended to apply to the unsecured debt. When it is sought to deprive of his security one who has come to the relief of an embarrassed corporation, relying upon the collaterals offered by it, clear and positive proof must be produced."

²⁰. In *re Eisenberg*, 16 A. B. R. 777 (D. C. N. Y.); *Abbott v. Anderson*, 31 A. B. R. 877, — Ill. — (App.

Ct.). Compare similar rules relative to discharge, post, § 2662, et seq.

²¹. See ante, Introduction, § (n).

Again, undistributed portions of the settlement money do not belong to the bankrupt estate where distribution was being made by the lender's agent and no part of the settlement money had yet been paid to the bankrupt or distributed by him.²²

The Amendment of 1910 permits the debtor, after the filing of a petition in bankruptcy and before adjudication thereon, to make a composition with his creditors.²³

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session: "Compositions can now be obtained only after an adjudication that the debtor is a bankrupt, with the resultant stigma on his name. (In re Back Bay Automobile Co., 158 Fed. 679, 685.) The change in § 12 of the law, which would be accomplished by this section of the bill, simply makes it possible for debtors to compose with their creditors before adjudication and without such stigma; in other words, encourages settlements between debtor and creditors under the supervision of the court, and is compulsory upon all creditors when a given proportion in number and amount shall have assented. Such settlements are now accomplished outside of court and frequently do not result in all creditors getting the same percentage, some one or more exercising the leverage of 'holding out' to get for himself a more advantageous settlement in secret. These settlements, before adjudication under court supervision, are exceedingly popular in England, and are specifically provided for by § 3 of the English bankrupt act of 1890. (53 and 54 Vict., c 71.)"

§ 2354½. Constitutionality of Compositions before Adjudication.

—The constitutionality of compositions before adjudication is supported on the basis that the "subject of bankruptcies," over which the Constitution gives jurisdiction to Congress, involves the relation of debtor and creditor in its broad sense, not dependent upon adjudication of bankruptcy, though requiring the institution of bankruptcy proceedings in some form.

Under the old Bankruptcy Act of 1867, wherein compositions before adjudication also were authorized, such a composition was upheld on the basis mentioned, where the point was raised that no title to the debtor's property had vested at any time in the creditors. The same point could be raised in every composition before adjudication even under the present Amended Act since the vesting of title is accomplished under the present act "by operation of law," upon adjudication and appointment of the trustee, whilst it was accomplished under the former act by actual assignment, which the bankrupt was compelled to make to his assignee in bankruptcy.

²². Impliedly, *In re Smyth*, 21 A. B. R. 853, 167 Fed. 871 (D. C. Pa.).

²³. Bankr. Act, § 12a, as amended in 1910: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions be-

fore adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

Compare [1867], *In re Reiman & Friedlander*, 11 Natl. Bankr. Reg. 21; 13 Nat. Bankr. Reg. 128; 7 Ben. 455; 12 Blatchf. 562: "But the question recurs 'What is the subject?' The subject is, 'the subject of bankruptcies.' What is the 'subject of bankruptcies?' It is not, properly, anything less than the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief. It comprises the satisfaction of the debts for a sum less than its amount, with the relief of the debtor from liability for the unpaid balance, and the right of the creditor to require that the amount paid in satisfaction shall be substantially as great a pro rata share of the property possessed by the debtor as it can pay, or can reasonably be expected to pay. * * * And even though there is not in these provisions for composition, any actual *cessio bonorum* through the intervention of an assignee or trustee, yet the property of the debtor is, in substance, distributed ratably among his creditors towards satisfaction of their claims, while he is released from future liability in respect to his debts, upon giving all the aid in his power towards the realization and distribution of his estate for the benefit of his creditors. * * * In view of all these considerations, how can it be said that these provisions of composition do not relate to the 'subject of bankruptcies?' They relate to the subject of debts owing by a debtor to creditors, and to the relation of the debtor to his creditors in view of his assets and of such debts. They place the subject under the jurisdiction of the Court of Bankruptcy, and require a petition in bankruptcy to be pending, either voluntary, which requires prior insolvency to be alleged, or involuntary, which requires the commission of a prior act of bankruptcy to be alleged, and, in either case, proceedings for composition are necessarily predicated on insolvency or existing inability to pay the debts in full. But, even, if a more restricted meaning be given to the expression 'subject of bankruptcies,' there is, within the scope of the discretionary power possessed by Congress of choosing the means to accomplish the end, a substantial appropriation of the existing property of the debtor towards all the debts due by him. There is not, as there is in proceedings carried through in bankruptcy, a pro rata payment on the debts only of those creditors who prove their debts, but all creditors are to have a payment pro rata. It must therefore, be held that the statutory provisions for composition are not open to the objection that they are not warranted by the Constitution."

Before the Amendment of 1910 it was held that compositions under the Bankruptcy Act could not be had until after adjudication.

In re Back Bay Automobile Co., 19 A. B. R. 835, 158 Fed. 679 (D. C. Mass.): "It cannot be denied, however, that the difficulties in the way of believing that the act does so permit, are many and serious. They may be stated as below; the word 'bankrupt' being understood to include a person against whom, as against this debtor, a petition has been filed, according to section 1 (4). 1. By § 12a, a bankrupt may offer composition after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in court the required schedule of his property and list of creditors. The report states that the bankrupt 'does not object to examination, has been already examined in open court under the present issue, and has filed his schedules of assets and liabilities.' The examination contemplated in 12a can only be the examination to which the bankrupt is required to submit by § 7 (9), 'when present at the first meeting of his creditors and at such other times as the court shall order.' The first meeting of this bankrupt's creditors has not been held. It cannot be held until after adjudication, according to § 55a. The court has never ordered

any examination of this bankrupt. Examination as a witness upon the issues of insolvency and the commission of the acts of bankruptcy charged, under the pending reference, is plainly not the examination referred to in § 7 (9), whose scope as there defined, is far wider than could be that of any examination possible under such a reference, and whose purpose is to assist that administration of a bankrupt's property which the court undertakes only after adjudication. If the court had ordered or should at this stage of the case order the bankrupt to submit to an examination under § 7 (9) or to appear for examination under § 21 (a), there would still be a doubt too strong to be dismissed as unreasonable whether such examination would be the examination contemplated by § 12a. And the power of the court to order such an examination before adjudication is at best doubtful. If, as the referee states, the bankrupt has filed its schedule of assets and liabilities, the filing has been with the referee only. At present there has been no reference under § 22, and that section permits no such reference until after adjudication. Before such reference it seems to me doubtful whether 'court' can include the referee according to § 1a (7). The bankrupt must file his schedules in court according to § 7a (8) within 10 days after adjudication. It may be true, as the referee says, that there can be no objection to the bankrupt voluntarily filing them at any time. But the filing contemplated in section 12a must, I think, if the most natural and reasonable construction is sought, be the filing required by § 7a (8). 2. By § 12b the court may be asked to confirm a composition 'after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must also represent a majority in amount of such claims.' No claims have yet been allowed. None can be allowed without a meeting of creditors. By § 55b the court is to allow or disallow the claims of creditors presented at the first meeting, before proceeding with the other business. There must be an opportunity for objections to allowance by parties in interest under § 57d. The first meeting of creditors cannot be had until after adjudication. The terms of § 55a make this clear beyond doubt, and no dispute on this point is attempted. It is said however, that a meeting of creditors may be had at any time under § 55e, that at such a meeting, if now had, creditors' claims may be allowed, and that the required majority of all claims so allowed may make the acceptance required for confirmation by § 12b. It is clear that a meeting of creditors now had, could not be the first meeting of creditors provided for by the act, although in point of fact it would be the first meeting held. The act providing for a 'first' meeting at a given time. * * * There are difficulties in the way of sanctioning the proposed meeting other than those depending upon the provisions regarding the first meeting. By § 55e there must be a written request for a meeting under it from one-fourth or more in number of those creditors who have proven their claims. 'Proven,' it is true, does not necessarily mean 'obtained the allowance' of their claims. But before a claim can be regarded as proven the written proof called for by § 57a must at least have been filed or lodged with the court or some officer thereof. That such written proof has been completed is not enough so long as the proof remains in the hands of the creditor or his attorney. *J. B. Orcutt Co. v. Green*, 204 U. S. 96, 17 Am. B. R. 72, 27 Sup. Ct. 195, 51 L. Ed. 390. Since no trustee has been or can yet be appointed, proofs could not be delivered to him as in the case cited. Possibly delivery to the referee might be enough, although no general reference of the case to him has been or can yet be made. But even if written proofs were now filed in court, they would be proofs of creditors who had chosen to file them now for their own purposes, in the absence of any general notice to all creditors that proofs of claims might now be filed. It would not naturally occur to a creditor to prove his claim at present, because at

present there is no bankrupt estate. I find it difficult to believe that the act can intend that any action by the court is to be obtained by the request of one-fourth of the owners of such claims as may be thus filed. If a meeting were called as proposed, the first step toward acceptance of the composition offer would necessarily be the allowance of such claims of creditors as had been then proved. The judge or referee may allow or disallow claims at the first meeting of creditors, according to § 55b; and it seems to me impossible to say that 'first meeting' here means anything different from the first meeting after adjudication, spoken of immediately before, in § 55a. In view of this provision and of the connection in which it stands, and of the fact that from no provision contained in the act can it be gathered that allowance of claims is to be permitted before the first meeting with which §§ 55a and 55b deal, I am obliged to hesitate before the conclusion that claims may be allowed in bankruptcy before it is ascertained that there is an estate to be distributed. To pass from examination of the terms of our present act to more general considerations: It appears that under other bankruptcy systems to which reference has been made composition before adjudication has been allowed, but when allowed it has been done by express and unmistakable statutory provisions. This is true of the English statutes now in force, and it was true of the amendment to our Act of 1867, in force from 1874 to the repeal of the entire Act in 1878."

CHAPTER XLVI.

PROCEDURE ON COMPOSITION.

Synopsis of Chapter.

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- § 2373. Only Judge to Pass on Application.
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DIVISION 1.

THE OFFER OF COMPOSITION.

§ 2355. **Offer of Composition.**—The first step in the procedure is for the bankrupt to offer terms of composition to his creditors. The statute provides that a bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting

of his creditors, and has filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.¹

The Amendment of 1910 applies this same rule to compositions before adjudication.

§ 2356. Statute Strictly Construed and All Requirements to Be Fulfilled.—This entire Section 12 of the Act should be strictly construed and all its requirements be carefully complied with.²

In re Frear, 10 A. B. R. 199, 120 Fed. 978 (D. C. N. Y.): "It will be observed that there has been no compliance with the law. The parties and referee have adopted a mode of composition and procedure utterly at variance with the law, and now ask the court to approve and confirm it. The proceedings adopted and followed is not sanctioned by the law, and neither the court nor the judge has power to confirm it.

"Promises to pay money or merchandise at a future day have been substituted for money; the money, etc., were not deposited in a place designated by the judge, or subject to his order; the offer and its acceptance were procured in violation of the provisions of the law; and, finally, if the judge or court should confirm the composition, so called, it would be impossible to comply with subdivision 'e' of § 12, which says, 'Upon the confirmation of a composition the consideration shall be distributed as the judge shall direct.' The consideration has never been subject to the order of the judge, and has been already distributed, so far as paid in, pursuant to the order of a referee who had no power or jurisdiction in the premises whatever, and whose acts were those of an individual, merely. This court has no power to ratify or confirm such a proceeding, and can not put its seal of approval thereon. The statute was made to be observed and complied with, and only when there has been a substantial compliance therewith will the judge or court approve and confirm the proceedings. These matters of noncompliance are not technical, but go to the very pith and marrow of the law and objects to be attained. If this proceeding is confirmed or approved, the court or judge will necessarily be compelled in the future to approve any manner or mode of composition to which creditors may not object. No significance can be attached to the fact that no creditor opposes this application. It is not probable that they have employed an attorney or know of their rights in the matter. But silence or acquiescence on the part of the creditors and their attorneys gives no excuse for the judge or court to violate the statute, or substitute an unauthorized and illegal proceeding for the one provided by law. Such silence confers no jurisdiction. Jurisdiction to confirm this so-called composition could not be conferred by the express consent of all the creditors. The bankrupt is not aided by subdivision 9 of § 2 of the Act."

And where the parties and the referee have adopted a mode and procedure utterly at variance with the law, the composition is not to be confirmed.³

1. Bankr. Act, § 12 (a).

2. In re Rider, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.), quoted ante, §§ 2350, 2351. Compare, analogously, Bank v. Doolittle, 5 A. B. R. 741, 107

Fed. 236 (C. C. A. Tex.). Compare [1867] In re Shields, Fed. Cas. 12,784.

3. In re Frear, 10 A. B. R. 199, 120 Fed. 978 (D. C. N. Y.).

§ 2357. Irregular Compositions and Settlements in Other than Statutory Manner.—Sometimes bankrupts attempt to settle with creditors after the institution of bankruptcy proceedings and to get back their assets without pursuing the statutory method provided for compositions. There seems no objection to such settlements, so far as the law is concerned; but they are full of risks to the parties. In the first place, care must be taken that notice goes to all creditors of the proposed dismissal, else creditors not notified may be entitled, perhaps, to reinstatement of the case. In the second place, care must be taken to get the consent of all creditors; for such a settlement is dependent upon consent and not upon the statute, and those not consenting will not likely be bound.

Thus, unscheduled creditors without notice may have their claims liquidated and passed upon despite a settlement and dismissal of the bankruptcy proceedings.⁴

And in one case it was held obiter that creditors had committed the crime of knowingly and fraudulently receiving a material amount of property from a bankrupt after the filing of the petition with intent to defeat the act, where, after an order had been obtained from the court dismissing a receiver and ordering him to turn back property to the bankrupt, the bankrupt had made a 40 per cent settlement with most of his creditors, the petition itself not being dismissed and adjudication of bankruptcy subsequently taking place on the intervening petition of other creditors.⁵

§ 2357½. Thus, Corporate Reorganizations.—Thus, agreements, in effect common-law compositions, may be effected after the institution of bankruptcy proceedings by way of the transfer of the assets to a new company, a "reorganized corporation," which will give its preferred or common stock or its own obligations therefor.^{5a} Such agreements, however, are dependent upon the mutual consent of the creditors, and those effecting them take the risk of securing the consent of all creditors in the same manner as in other irregular compositions and settlements after the institution of bankruptcy proceedings in other than statutory manner.^{5b} And they can not be forced upon the objecting creditors under the guise of a "compromise of a controversy."

In *re Northampton Portland Cement Co.*, 25 A. B. R. 565, 185 Fed. 542 (D. C. Pa.): "It may be that the proposed plan—which is not a composition, but a somewhat elaborate plan of reorganization—offers the unsecured creditors their only opportunity of obtaining any payment whatever upon their claims. Assuming the plan to be judicious, the question remains: Has the District Court any authority to enforce it? The fact that it has been approved by a large majority of the creditors is not decisive. Unless the Bankruptcy Act empowers the court

4. In *re Howard Lockwood & Co.*, 4 A. B. R. 731, 104 Fed. 794 (D. C. N. Y.).

5. *Knapp & Spencer Co. v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

5a. See post, § 2369.

5b. Compare *York M'fg Co. v. Merchants Ref. Co.*, 21 A. B. R. 748, 168 Fed. 108 (D. C. Mo.); In *re Woodend*, 12 A. B. R. 768, 133 Fed. 593 (D. C. N. Y.), quoted at § 2386.

to take up the plan and make it effective, the creditors must do this by concerted action among themselves, and can not have the sanction of a judicial order. The only section of the Act to which I am referred for the necessary authority is § 27: "The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

"It should be repeated that the proposed plan is not an offer of composition, and is not to be considered from that point of view. The bankrupt company is not making the offer, and there is no attempt to enable that corporation to resume business. On the contrary, a new corporation is to be formed, having mortgage bonds and capital stock, both preferred and common, and as a detail of the scheme it is proposed to transfer to the new corporation all the assets of the bankrupt—in part, by a future sale of the realty under an order of the court, and in part by a conveyance of certain personalty and other assets now in the hands of the trustee. It seems clear that such a plan can not be imposed upon unwilling creditors. If all parties in interest should agree, something might perhaps be said in favor of assisting the formalities of transfer by proper judicial orders, but there is no inherent power in the court to compel minority creditors to give up legal property rights, and in their stead to accept securities and incur liabilities which have already been declined. If such power exists, it must be found in the Bankruptcy Act. No doubt a composition may be imposed upon a reluctant minority of the creditors, but the power to carry out such an arrangement has been expressly given. There is no such grant of authority in case a certain plan of reorganization should seem desirable to the majority of a bankrupt's creditors. Section 27, which is alone relied upon to support the referee's order, has of course no reference to compositions; and, while its precise scope must be determined gradually, I think I may safely say that it does not authorize the approval of an elaborate plan—such as is now presented—to adjust the affairs of a bankrupt corporation and begin a new business venture. Disputes about the validity of claims are evidently the chief object of § 27, although it probably includes other controversies as well, but its scope would, I think, be enlarged unduly if it were construed to justify the court in compelling dissenting creditors to do such things as accepting stock in a new corporation, putting their stock in a voting trust for several years, giving up an existing claim upon money and other assets, consenting to the creation and priority of a large mortgage, and assenting to many other provisions such as are usually contained in a contract of reorganization. In my opinion, a bankruptcy court has not been empowered to embark in enterprises of this kind. They may be desirable, but the creditors must determine that for themselves. The usual course of administration may be certain to result in heavy loss, but the court must pursue that course unless the Act has authorized the use of exceptional means."

Nor can they be sustained on the theory of a "sale by the trustee or receiver in bankruptcy."

In *re Cornell Co.*, 26 A. B. R. 252, 186 Fed. 859 (D. C. N. Y.): "Upon consideration, I think that the objections stated in the memoranda submitted in behalf of some of the unsecured creditors are insuperable. In the first place, the so-called bid is not strictly a bid at all. It does not offer to pay anything to the receivers. It is in form a proposition to have a new corporation take over all the assets of the bankrupt except a few contracts, and then have the creditors of the bankrupt directly accept, in place of their claims against the bankrupt, unsecured obligations of the new corporation, payable at different dates in the future, run-

ning from nine to twenty-seven months. The parties who make the bid are the principal creditors, and, of course, so far as they are concerned, any arrangement which they agree to would be satisfactory. But in addition to the claims which they represented, aggregating about \$225,000, there remain further claims aggregating about \$30,000, held by creditors of the receiver, who have furnished materials or labor, in connection with the business which the receivers were authorized to carry on by order of the court, and with the consent and approval of the creditors making the bid. The bid proposes, in substance, to give these creditors either 25 per cent. cash for their claims, or certificates of the new corporation for the full amount of their claim, payable about two years hence, after the holders of the receivers' certificates have been paid. I do not think that a bankruptcy court has any power to make such an order as against non-assenting creditors. The court can not arbitrarily order that any creditor who objects shall receive 25 per cent. of his claim when it is not apparent that upon a formal liquidation he will not receive a larger amount. Nor can any bankruptcy court compel a creditor to consent to have all the bankrupt estate transferred to a corporation and accept in settlement of his claim obligations of the new corporation, payable at a future date. There is no explanation in this bid of what the amount of the capital of the new corporation will be, or how it will be furnished, or how the money necessary to carry on the business will be obtained, but the bid states that any new indebtedness which may be necessarily created by the corporation for money borrowed for any purpose shall have priority over all the certificates of indebtedness proposed to be given in settlement of the debts of the bankrupt. The proposition therefore is that a court of bankruptcy is to authorize a transfer of all the assets of the bankrupt to a corporation, and compel the creditors of the bankrupt to take the unsecured obligations of the new corporation, payable a long time in the future, and to have it in the power of the new corporation to create obligations which shall be a prior lien on its assets over its liability upon its obligations to the creditors of the bankrupt. I am clear that a court of bankruptcy has no power to authorize such a sale, and, if it had, I should deem it inexpedient to do so."

§ 2358. Special Meeting for Presentation of Offer.—It is not, perhaps, necessary that a special meeting of creditors be called in order to have the presentation of the offer to creditors legal;⁶ but it is the better practice to present the offer at a special meeting called for that express purpose.⁷

The statute, to be sure, does not require such special meeting, but the reason of the matter would show it to be manifestly unfair to creditors not to give them special notice of so important a move as the offer of a composition. As the court says in

In *re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.): "A construction which permits the bankrupt to select a time when but few creditors have proved and then to present his terms only to such creditors as he believes to be friendly to his interest, keeping the general creditors in the dark until he has obtained a majority of the few who have proved, is contrary to the intent and spirit of the law. It would enable a few active and friendly creditors on the spot so to ma-

6. In *re Hilborn*, 4 A. B. R. 741, 104 Fed. 866 (D. C. N. Y.).

7. Impliedly, In *re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.).

nipulate the proceedings that the necessary majority could be secured while distant creditors were wholly ignorant of the proposed settlement. * * *

"Section 12 is easily capable of a construction compatible with the intent and purpose which has always ruled proceedings of this kind. After the bankrupt has been examined and filed a list of his creditors he 'may offer terms of composition to his creditors.' This plainly implies that the offer should be made to all creditors, whether they have proved their debts or not. It is not essential that proofs shall be made before, or at, the first meeting. They may be made at any time within a year after the adjudication, and it is not necessary that they shall be filed, in the first instance, with the referee. Section 57, c. n.

"After the terms are thus made known to all the creditors they have a reasonable time to decide whether they will accept the offer or not."

The fact that the offer is made at the meeting of creditors, and that the notice states that the meeting has been called for the election of a trustee and "for other matters," will not circumvent the salutary rule that special notice ought to be given of the proposed settlement to all creditors. Creditors might not care to be present at the election of a trustee to conduct the administration of the estate in the regular way, though they might be greatly interested in the offer and acceptance of a proposed composition.

In *re Frear*, 10 A. B. R. 199, 120 Fed. 978 (D. C. N. Y.): "Notice by mail and by publication of motion to confirm was given. But this is not a presentation of the offer of compromise. The general creditors who do not appear at the first meeting have the right to assume that the estate will be administered in the regular way."

And such creditors might have much to say that would influence the other creditors to reject the same.

Moreover, turning to the forms and orders prescribed by the Supreme Court, a light is thrown upon the subject by the interpretation manifestly put upon the statute by the Supreme Court; for the Supreme Court has prescribed a form, known as Form No. 60, for calling precisely such a meeting—a meeting to consider a proposed offer.⁸

Thus, even by the Supreme Court's form it appears the bankrupt is to make his offer at a meeting of creditors called for the special purpose.

8. Compare, Form No. 60: "The above named bankrupt respectfully represents that a composition of — per cent upon all unsecured debts, not entitled to priority — in satisfaction of — debts has been proposed by — to — creditors, as provided by the acts of Congress relating to bankruptcy, and verily believe that the said composition will be accepted by a majority in number and in value of — creditors whose claims are allowed. "Wherefore, he prays that a meeting of — creditors may be duly called to act upon said proposal for a composition, according to the pro-

visions of said acts and the rules of court."

In *re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.).

No Estoppel of Adverse Claimant after Refusal of Offer Because of His Standing by Silently without Claiming Ownership before Refusal.—It has been held that where one at a meeting of creditors to consider a composition, keeps silent as to his ownership of certain property in the hands of the trustee, he is not estopped from asserting title where the composition was not agreed upon. In *re Loll*, 20 A. B. R. 548, 162 Fed. 79 (D. C. Conn.).

By the Amendment of 1910, permitting compositions before adjudication of bankruptcy, it is specifically provided that the court shall call a meeting of creditors.⁹

To be sure, it is not expressly provided that the notice of this meeting shall state its object, although, clearly, the meeting is called for the special purpose of receiving the offer of composition, since a meeting of creditors before adjudication is not elsewhere provided for in the Bankruptcy Act; and the proper practice would be for the notices of this meeting to state the object of it.

Although the statute permitting compositions before adjudication is silent as to the method to be pursued by the bankrupt in the first instance, yet properly the bankrupt should file a motion, or "petition," with the judge, setting forth his desire to make an offer of composition and praying the court to call a meeting of creditors to receive the same, and, ordinarily, for a reference to a referee for the purpose.

§ 2358½. Practice in Compositions before Adjudication.—(The proper practice, in cases of compositions to be offered before adjudication of bankruptcy, is for the bankrupt to file, with his petition in cases of voluntary bankruptcy, and after the filing of the creditors' petition in involuntary cases, a "petition," to which in involuntary cases should properly be annexed a schedule of creditors with their addresses, in which petition prayer should be made for the calling of a meeting of creditors and reference of the case to a referee.¹⁰

§ 2359. Examination of Bankrupt and Filing of Schedules Requisite before Offer.—Before presenting the offer the bankrupt must have been examined in open court or at some meeting of his creditors. He also must have filed his schedules—his schedules of assets and his list of creditors. Not until then it is competent for him to present the offer.¹¹

§ 2360. Offer to Be Accepted in Writing.—The offer must be accepted in writing.¹²

9. Bankr. Act, as amended in 1910, § 12a.

10. Compare, (1867) *In re VanAucken*, et al., 14 N. B. Reg. 425; *In re Reiman & Friedlander*, 11 N. B. Reg. 21, 13 N. B. Reg. 128, 7 Ben. 455, 12 Blatchf. 562. Compare, also, *In re Trafton*, 14 N. B. Reg. 507; instance, *In re Leibziner*, 17 N. B. Reg. 264.

11. *Obiter*, *In re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.).

Bankr. Act, § 12a, as amended in 1910: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the

schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

12. Bankr. Act, § 12 (b); *In re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.).

§ 2361. Offer to Be Accepted by Majority in Number and Amount of Allowed Claims.—The offer must be accepted by at least a majority in number and amount of creditors whose claims have been, by that time,¹ allowed; but no more are requisite.¹³

It does not require acceptance by a majority in number and amount of all claims against the bankrupt, nor even of *all* claims against him that are already allowed and that may be allowed within a certain time afterwards. It is only requisite that the acceptance be by a majority whose claims have already been allowed. Hence, the reason of the rule, that the offer should be made only at a meeting specially called for that purpose becomes even more evident.

Compare, *In re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.): "The present law should be construed in the light of similar prior enactments, and any doubt should be resolved against those who seek to deprive creditors of the right to have the debtor's property applied to the payment of his debts. Nothing short of an absolutely plain and unambiguous provision will convince the court that Congress intended for the first time, it is thought, in the history of bankruptcy legislation, to vest such unusual and dictatorial powers with a minority of the creditors. It may be assumed that the language of § 12 is not as perspicuous as could be desired, but, read as a whole, the intention of Congress seems plain to permit a compromise only when sanctioned by a majority in number and amount of the creditors whose claims have been allowed, after due notice to them of the bankrupt's proposition. If the construction contended for by the bankrupt be accepted it will lead to most inequitable results. Take, for illustration, a case where there are thirty creditors and only three have proved their debts, for equal amounts, at the time the composition is offered. If the bankrupt obtains the consent of two of them the composition must be confirmed, although the remaining twenty-eight creditors may be in open opposition."

On the other hand, it does not mean that the creditor need be present either in person or by proxy, as is requisite to participation in other creditors' meetings. Creditors may act through their duly appointed attorneys in fact,¹⁴ but the power of attorney should provide specially for the acceptance of a composition.

§ 2362. Creditors Once Accepting May Not Withdraw, Except for Fraud or Misrepresentation.—Creditors once accepting will not be allowed to withdraw acceptance, in the absence of fraud or misrepresentation.

In re Levy, 6 A. B. R. 299, 110 Fed. 744 (D. C. Penn.): "These creditors voluntarily came into court, accepted the proposed composition and asked the court to act in the matter and confirm the composition. They procured the court to act, and they are now estopped from interfering with the further conduct of the case in the matter of this composition. Had they alleged fraud or misrepresentation in the procuring of their signatures to the acceptance the case would be different."

13. Bankr. Act, § 12 (b); *In re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.).

14. Bankr. Act, § 1 (g); [1867] *In re Weber Furn. Co.*, 13 B. Reg. 529, 559, Fed. Cases, 17,330.

§ 2362½. **Whether Different Terms May Be Offered.**—It is probable that different terms of composition may be agreed upon at the meeting of creditors from those originally offered.¹⁵

It is not the same as taking a default judgment, for in cases of compositions there must be assent of creditors and the assent must be in writing.

DIVISION 2.

FILING OF THE APPLICATION FOR THE CONFIRMATION OF THE COMPOSITION.

§ 2363. **Petition for Confirmation of Composition, When May Be Filed.**—After the acceptance of the offer by the requisite creditors, the next step is the filing of the petition for confirmation of the composition. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority, and the cost of the proceedings, have been deposited subject to the order of the judge in such place as shall be designated by the order.¹⁶

§ 2364. **Designation of Amount and Place of Deposit.**—From a strict reading of the statute it might appear that the bankrupt should procure a special order from the judge, designating the amount and place of deposit of the consideration proposed by the offer to be given to the creditors and to cover the costs.¹⁷

In practice a special order is not generally made before the filing of the application, but the referee in charge certifies to the requisite amount and the bankrupt thereupon deposits the money in the regularly designated depository.

But this preliminary order requiring deposit becomes of more importance than is usually accorded to it, when one comes to consider its possible relation to the rights of unscheduled creditors where the deposit falls short of being sufficient to cover the claims of unscheduled creditors, as discussed post.¹⁸

However, the proper practice is to hold before the referee merely the preliminary meeting, for the proof of claims, for the examination of the bankrupt and for the consideration of the offer of composition, all subsequent steps to be taken before the judge himself.

In re Bloodworth-Stembridge Co., 24 A. B. R. 156, 178 Fed. 372 (D. C. Ga.): "Our valuable referee has, I fear, gradually gotten away from the correct prac-

15. (1867) In re Haskell, 11 Nat. Bankr. Reg. 164.

16. Bankr. Act, § 12 (a); Bankr. Act, § 12b.

17. In re Frear, 10 A. B. R. 199,

120 Fed. 978 (D. C. N. Y.); In re Bloodworth-Stembridge Co., 24 A. B. R. 156, 178 Fed. 372 (D. C. Ga.), quoted supra.

18. See post, § 2367½.

tice in cases of composition, and the court has been in some sense particeps criminis in that respect. I have all along had some doubts as to the extent to which the referee has gone; but this is the first time that objection has been made to the referee doing everything in the case, except merely to hand up the record for the judge's approval. Now there is a great deal which may not be done, save by the judge, in cases of composition. The referee may generally be regarded as the bankruptcy court, but not to the full extent in cases of composition.

- The act * * * it is true, declares that: 'A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.' I consider that this 'hearing' may be had before the referee, and that the term 'in open court' refers to the proceeding before the referee. This is determinable from the association of the legislative purpose there, 'noscitur a sociis.' He must be 'examined in open court or at a meeting of his creditors.' Generally a meeting of creditors is held before the referee. Therefore that examination should be had before the referee, and he must have 'filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.' These schedules the referee ordinarily handles, and up to this point the composition may proceed properly before the referee. The next clause, however, indicates a change of authority: 'An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.' Now, wherever in the Bankruptcy Act the term 'judge' is used it means the judge of the District Court, and not the referee in bankruptcy. It follows, therefore, that these requisites, essential to composition made by the act, must be presented to the judge, and the costs of the proceeding and the deposit must be designated by the judge, and subject to the order of the judge. The referee, as I understand, has to a liberal extent taken charge of these matters, and relieved the judge of a great deal of labor; but certain action of his in this respect has apparently exceeded the limits of his powers fixed by the act. * * * And when we turn to the forms we will also perceive that it is the judge who must act. The judge must fix a date for the hearing, and that is a hearing before him. The judge must require the money to be deposited, and designate what sum shall be deposited, and it must be deposited subject to his orders."

§ 2365. Deposit to Be Sufficient to Pay All Costs and Priority Claims, as Well as Consideration to Creditors.—The deposit must be sufficient to pay all costs and all priority claims, as well as the consideration that will go to general creditors.¹⁹

Thus, it must be sufficient to cover taxes.²⁰

§ 2366. Must Cover All Claims Filed and All Scheduled.—The deposit must also be sufficient to pay the percentage not only on all claims filed

¹⁹. Bankr. Act, § 12 (b). In re Harris, 9 A. B. R. 20, 117 Fed. 575 (D. C. Tenn.); In re Fox, 6 A. B. R. 525 (Ref. Ohio, affirmed by D. C.);

In re Harvey, 16 A. B. R. 345, 144 Fed. 901 (D. C. Pa.).

²⁰. In re Flynn, 13 A. B. R. 720, 134 Fed. 145 (D. C. Mass.).

before the confirmation, but also on all other claims listed by the bankrupt in his schedules.²¹

§ 2367. Whether Must Cover Deficiency of Secured Claims Not Yet Filed.—It has been held that the deposit need not cover the percentage on the deficiency of secured claims where such claims have not been filed.²² But this is doubtful law. The bankrupt can estimate the value of the securities if the creditor neglects to do so and the creditor will be estopped by his laches.

§ 2367½. Claims Not Scheduled, nor Filed.—It has been held that there is no power in the bankruptcy court, after confirmation of a composition, to compel the bankrupt to add to the deposit sufficient to cover a claim that was neither scheduled nor filed.

In *re Abrams & Rubins*, 23 A. B. R. 25, 173 Fed. 430 (D. C. N. Y.): "In this case it is quite clear that I can not grant the relief asked for in the petition, that the bankrupt pay the same proportion of their debt to the petitioners that he has paid to others. No such relief is known, and it would upset all compositions were I to grant it now. The petition, however, may be reformed as a petition to reopen the composition, if the petitioner wishes it to stand as such. To set aside a composition once confirmed, I must find that it was procured by fraud, for that is the only ground allowed by the statute, § 13. There are, in this case, only two possible sources of fraud: First, that the bankrupts omitted the claim in bad faith, knowing that it had some validity, and, second, that they deceived the petitioner into supposing that he need not file his proof of claim until he actually did, and that he would still come into the composition, all the while hurrying through the composition so as to exclude him. If the petitioner wishes an issue on either or both of those issues, I will grant it, and upon proof of either I will set aside the composition, at least to the extent of preventing the bankrupts taking advantage of it as a discharge."

It is doubtless true that the order of confirmation of a composition should in general be treated as an order of discharge; for it has the effect of a discharge, so far as the release of debts is concerned, and it takes the place of a discharge, and should be set aside in general only in the same manner as a discharge. And it is also true that an unscheduled debt is in no worse position in case of a composition than in that of a discharge, the creditor's claim in either event being undischarged, unless he had timely information of the bankruptcy. Yet, the bankrupt's offer in terms is to "all" his creditors, and the court's order for deposit as well as its order of confirmation ought to provide for the deposit for the sufficient payment of the percentage to "all" creditors; in which event, to vacate the order of confirmation afterwards, for the bankrupt's failure to deposit enough to cover an unscheduled debt, would not be perhaps so much a "setting aside" of the composition

²¹ In *re Fox*, 6 A. B. R. 525 (Ref. Ohio, affirmed by D. C.); In *re Harvey*, 16 A. B. R. 345, 144 Fed. 901 (D. C. Pa.).

Compare, In *re Ennis & Stoppani*, 25 A. B. R. 383, 183 Fed. 859 (D. C.

N. Y.), where court refused to set aside a composition after six months upon the petition of a creditor whose claim had not been scheduled.

²² In *re Harvey*, 16 A. B. R. 345, 144 Fed. 901 (D. C. Pa.).

within the meaning of the statute, as it would be the correction by the court itself of an irregularity in the procedure, as discussed post, § 2399, and analogously to the postponement of discharges for failure to comply with court rules, as discussed post, in § 2480. Furthermore, where the order of the court requiring the deposit, which precedes the order of confirmation, does provide in terms for a sufficient deposit to cover the claims of "all" creditors, then the bankrupt's knowing failure so to provide might be such a "refusal to obey a lawful order of the court" as itself to be at any rate a bar to discharge, under Bankr. Act, § 14 (b) (6). Also the knowing omission to schedule might itself be a sufficient "fraud" under § 2400. However, except in the case of fraud, it is quite clear that one who is not scheduled but who knows of the bankruptcy, takes his own risk of a composition being made and confirmed without himself being included.²³

§ 2368. What Costs Provided for in Composition.—The costs and priority claims will be regulated by the same rule in compositions as in the regular administration of the bankrupt estate, except that the referee and trustee will each receive only one-half of one per cent. for their commissions. Frequently it happens also that no trustee is elected, the election being deferred pending the composition proceedings. So these items are likely to vary in these particulars from the usual costs of the regular bankruptcy proceedings; otherwise they are the same.²⁴

The court will not order the costs paid, against the objections of the bankrupt. It will simply refuse to confirm the composition until they are provided; for the composition must be voluntary on the bankrupt's part.²⁵

The election of a trustee may be dispensed with or postponed, where the bankrupt announces his intention of offering terms of composition.²⁶

§ 2369. Whether Consideration Always to Be in Money.—Whether the consideration must always be money is not clear. The wording of the section is very significant—the use of the word "consideration" instead of the word "money" in the part that relates to what shall be deposited for the creditors, and the use of the word "money" in the part that provides what shall be deposited to pay costs and priority claims; also the necessities of the situation itself—the bankrupt usually having little opportunity of getting money—are likewise significant, and point to an intention on the part of Congress to leave it possible for the bankrupt to obtain a composition on the strength of depositing for creditors something else than money, as, for instance, his promissory notes secured by endorsement or by mort-

²³. At any rate, where he knows he is not scheduled, *In re Abrams & Rubins*, 23 A. B. R. 25, 173 Fed. 430 (D. C. N. Y.).

²⁴. Instance of costs on composition: Attorneys' fees to petitioning creditors and bankrupt. *In re Talton*, 14 A. B. R. 617, 137 Fed. 178 (D. C. N. Car.).

Instance of costs refused: No allowance to referee as special master. *In re Talton*, 14 A. B. R. 617, 137 Fed. 178 (D. C. N. Car.).

²⁵. *In re Harris*, 9 A. B. R. 20, 117 Fed. 575 (D. C. Tenn.).

²⁶. *In re Rung Bros.*, 2 A. B. R. 620 (Ref. N. Y.).

gage upon the property thus redeemed by him from bankruptcy;²⁷ or part in cash and the remainder in promissory notes;²⁸ or perhaps, as discussed ante, § 2357½, shares of stock.²⁹

The law of 1867 provided for payment or satisfaction in money in contradistinction from other property, but nevertheless even under that law a composition was held proper that was effected by the giving of notes.³⁰

It is still to be considered a payment in money, though the payment is deferred or made in installments.

§ 2370. Form of Application for Confirmation of Composition.—

The form of the application for the confirmation of a composition is prescribed by the Supreme Court, and is known as Form No. 61.³¹ It sets forth the performance of the requisite acts hereinbefore mentioned.

§ 2371. Ten Days Notice by Mail to Be Given.—Ten days notice by mail must be given to all creditors, unless waived by them in writing, of the hearing upon the application for the confirmation of the composition.³² This notice is usually given by the referee.

§ 2371¼. Bankruptcy Petition Adjourned in Compositions before Adjudication.—It is expressly provided by the Amendment of 1910 to, § 12a, authorizing compositions before adjudication, that in such cases the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.³³

§ 2371½. Not Always Dismissed on Confirmation.—The petition for adjudication need not be dismissed even upon confirmation of the com-

27. But see *In re Frear*, 10 A. B. R. 199, 120 Fed. 978 (D. C. N. Y.).

28. Instance, *In re Sacharoff & Kleiner*, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

Composition Notes Not Paid When Due.—Compare, *In re Sacharoff & Kleiner*, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

29. Compare ante, § 2357½. *In re Woodend*, 12 A. B. R. 768, 133 Fed. 593 (D. C. N. Y.), quoted post, § 2386: In this case confirmation was refused, but not upon the ground that the offer was not in money.

York Mfg. Co. v. Merchants Ref. Co., 21 A. B. R. 748, 168 Fed. 108 (D. C. Mo.): In this case one of the creditors refused to accept the bonds and stock of the organized company, and claimed mechanics' liens; its request for impounding of the composition securities until its rights as lienholder were determined, was refused.

Reorganized Corporation Taking Over Assets and Giving Its Notes.—Doubtless the composition may be

effected by way of the transfer of the assets to a new company, a "reorganized" corporation which will give its own obligations therefor. Compare however [where it was sought to carry out such a scheme but the parties erroneously applied for a sale direct to the new corporation in exchange for the latter's notes, instead of accomplishing it by way of composition]. *In re Cornell Co.*, 26 A. B. R. 252, 186 Fed. 859 (D. C. N. Y.).

Compare, to similar effect, *In re Northampton Portland Cement Co.*, 25 A. B. R. 565, 185 Fed. 542 (D. C. Pa.).

30. *In re Reiman*, 11 B. Reg. 21, 13 Reg. 128, 12 Blatchf. 562; *In re Langdon*, 13 B. Reg. 60; *In re Lewis*, 14 B. Reg. 144; *In re Hurst*, 13 B. Reg. 455.

31. See Appendix, Official Form 61.
32. Bankr. Act, § 58 (a) (2).

33. Bankr. Act, § 12a, as amended in 1910: " * * * In compositions before adjudication * * * action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

position, until the terms of the composition have been actually carried out; at any rate, such was the holding under the law of 1867, although most of the cases cited thereunder were conditioned to be "upon payment."³⁴

In re Hurst, 13 Nat. Bankr. Reg. 455: "The composition will not be effective to discharge the debtor, unless the amount agreed upon is actually paid."

Compare, In re Mickel, 19 Nat. Bankr. Reg. 374: "A final order in composition is not a final disposition of the proceedings in bankruptcy. The case in bankruptcy is still pending, and the power of the court continues to stay the proceedings of creditors in suits pending against the bankrupt so long as the composition is unpaid. In re Bayly & Pond, 19 N. B. Reg. 73; McGee v. Hentz, 19 N. B. R. 136."

It is further to be noted that § 12e provides that "upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed." The relative position of these various clauses would seem to indicate that the consideration should be distributed before the case is dismissed.

The points above adverted to will be of special importance in carrying out compositions before adjudication, as now authorized by the Amendment of 1910; especially in cases where the consideration is not paid immediately in money, but is effected by way of secured commercial paper or otherwise.

DIVISION 3.

HEARING ON PETITION FOR CONFIRMATION OF COMPOSITION.

§ 2372. Hearing on Petition for Confirmation of Composition.—

The statute in § 12 (c) provides that

"A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition; and such objections as may be made to its confirmation."

And further provides that "the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden."

§ 2373. Only Judge to Pass on Application.—Only the judge may pass upon the application for the confirmation of a composition.

Section 38 in clause 4, in prescribing the jurisdiction of referees, provides that they shall

³⁴. [1867] In re Reiman & Friedlander, 11 N. B. Reg. 21, 13 N. B. Reg. 128, 7 Ben. 455, 12 Blatchf. 562; [Eng.] In re Hatton, L. R. 7, Ch. App. 723; [Eng.] Edwards v. Coombe, L. R. 7,

Common Pleas 519; (1867) In re McKeon, 11 N. B. Reg. 182; [1867] In re Bayly & Pond, 19 N. B. Reg. 73; [1867] In re Leibinger, 17 N. B. Reg. 264.

"Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on Courts of bankruptcy," etc.

Therefore, composition matters must all go directly before the judge.

§ 2374. But May Refer Issues to Referee as Special Master.—

But the judge may refer the questions involved to the referee as a special master, who will then report his findings to the judge for final disposition.³⁵

Adler v. Jones, 6 A. B. R. 247, 109 Fed. 967 (C. C. A. Tenn.): "Questions arising out of applications for confirmation of compositions are, therefore, addressed to the judge. He may doubtless require the referee to report the facts."

35. See general Order No. XLI of the Supreme Court's General Orders in Bankruptcy: "3. Applications for a discharge, or for the approval of a composition * * * shall be heard

and decided by the Judge. But he may refer such an application, or any specified issue thereon, to the referee to ascertain and report the facts."

CHAPTER XLVII.

OPPOSITION TO CONFIRMATION OF A COMPOSITION.

Synopsis of Chapter.

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§ 2375. Only Creditors May Oppose Confirmation: Trustee May Not.

§ 2376. Court May Refuse Confirmation without Appearance of Any "Party in Interest," Where Procedure Irregular.

DIVISION 2.

§ 2377. Procedure on Opposition to Composition Similar to That on Discharge.

§ 2378. Entry of Appearance Requisite.

§ 2379. Ten Days Time after Appearance, for Filing Specifications.

§ 2380. Form and Allegations of Specifications Similar to Discharge.

DIVISION 3.

§ 2381. Three Grounds of Opposition.

§ 2382. Statutory Grounds Requisite to Bar Confirmation on Merits.

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SUBDIVISION "A."

§ 2384. First Ground—"Not for Best Interests of Creditors."

§ 2385. Test of "Best Interest"—Whether More Could Be Realized by Ordinary Administration.

§ 2386. Creditors' Acceptance of Offer Not to Be Lightly Interfered with.

SUBDIVISION "B."

§ 2387. Second Ground—Commission of Act Barring Discharge, Bars Composition.

SUBDIVISION "C."

§ 2388. Third Ground—Offer or Acceptance Not in Good Faith or Procured Improperly.

DIVISION 1.

WHO MAY OPPOSE THE CONFIRMATION OF A COMPOSITION.

§ 2375. **Only Creditors May Oppose Confirmation: Trustee May Not.**—The statute does not in express terms declare who may oppose the confirmation of a composition, but does so impliedly, by providing, in general terms, in § 12 (c) for the fixing of a time and place convenient to "parties in interest."¹

But by construction of the statute and orders it was deduced before the Amendment of 1910 made trustees competent to oppose discharges that only creditors might be parties to oppose compositions, and that the trustee might not do so.

1. In re Levey, 13 A. B. R. 312, 133 Fed. 572 (D. C. N. Y.).

Ross v. Sanders, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.): "There is no law authorizing any person to become a party to this proceeding except the bankrupt and his creditors. The statute directs notice to the latter, and to no other person; and General Order 32 (32 C. C. A. xxxi, 89 Fed. xiii.) provides for their appearance, and for no other. There is nothing in the statute or in the General Orders which authorized the trustee, as trustee, to interfere in this proceeding, beyond furnishing such information concerning the estate under his charge, and the administration thereof, as might be requested, which duty is expressly imposed on him by law. Neither is there anything which justifies the trustee in defending this appeal at the expense of the estate, or in his capacity as trustee. The English statutes in bankruptcy provide expressly that a trustee may appeal from an order of confirmation. Under those statutes the official receiver becomes the ad interim trustee, and stands quasi trustee until the trustee proper is appointed. Therefore he has the same relation to a question of composition which the trustee has, but he is not expressly authorized by the statutes to appeal. Consequently, in *Ex parte Reed*, 17 Q. B. Div. 244, 258, an official receiver was somewhat sharply told that he ought not to appear on the hearing of an appeal of this character unless the court required him to do so. In that particular case it was held that he ought not to have appeared, and his costs were refused, although the composition was set aside. This is in accordance with the ordinary rule that a stakeholder stands equal between the parties concerned, and should not interfere in litigation unless required to do so by the court which has jurisdiction over him."

Thus, it was held that a creditor, who, by an assignment induced by the alleged false representations of the trustee and bankrupt, had parted with all title to his claim against the estate could not assail a composition nor move to vacate its confirmation.²

But one who had bought a creditor's claim for the very purpose of opposing the confirmation was held to be nevertheless a party in interest competent to oppose it.

In *re Comstock*, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.): "Objection is made to the status of the single objecting creditor, on the ground that the confirmation is opposed, not by an original creditor, but by an assignee, who is said to have bought the claim for the purpose of forcing a settlement or discontinuance of a suit instituted by the trustee against one Peck, through threats of opposition to the confirmation. There is reason to believe that this may be the fact, and that the objector, in procuring an assignment of a claim and in filing objections, had another motive than the securing of a dividend larger than the amount offered in composition. The assignee of an original claim, however, has all the legal rights of his assignor. *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 17 Am. B. R. 77. In pursuing his objections to this composition, he is acting within his legal rights. That he had ulterior or improper motives in acquiring the claim, or that he may have contemplated the use of it for extortion, is not improbable; but is this material? By pursuing his objections before the judge, he has put it out of his power to coerce the bankrupt or the trustee by threats of objecting to the composition. He is now exercising the rights of a creditor for a legitimate purpose, and to inform the court that facts exist which deprive this bankrupt of the right to a discharge."

2. Obiter, In *re Wrisley Co.*, 13 A. B. R. 193, 133 Fed. 388 (C. C. A. Ills.).

To be sure, the Amendment of 1910 makes the trustee a "party in interest" for the purpose of opposition; but whether he would be a "party in interest" in composition matters, is a question.

§ 2376. Court May Refuse Confirmation without Appearance of Any "Party in Interest," Where Procedure Irregular.—It may be the duty of the judge, without the appearance of any party in interest in opposition, to refuse to confirm a composition,³ or to refer the matter for further consideration where that course is deemed to be advisable.⁴ But such refusal should occur only where the proceedings are irregular.

The statute hardly permits the court, of its own motion, to refuse confirmation on the merits, any more than to refuse discharge.⁵ Otherwise, the judge would put himself virtually in the position of a party litigant; thus, for example, on an appeal by the bankrupt from an order of refusal, there might be no one else to defend the refusal.⁶

DIVISION 2.

PROCEDURE UPON OPPOSITION TO CONFIRMATION OF COMPOSITION.

§ 2377. Procedure on Opposition to Composition Similar to That on Discharge.—In general, the procedure on opposition to confirmation of a composition is similar to that on opposition to discharge.⁷

§ 2378. Entry of Appearance Requisite.—Any creditor desiring to oppose the confirmation of a composition must enter his appearance—that is to say, appear before the judge or the district clerk and have the entry made that he appears—for the purpose of opposing the confirmation at or

3. *Ross v. Saunders*, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.), wherein the court quotes *In re Burr*, 2 Q. B. Div. 467, 472: "In bankruptcy cases, the court has very often to protect creditors against themselves." But compare, *Ex rel. Adler v. Hammond*, 4 A. B. R. 736, 104 Fed. 62 (C. C. A. Tenn.).

4. *In re Secker & Silverman*, 28 A. B. R. 627, 197 Fed. 128 (D. C. N. Y.).

5. But compare, apparently, *In re Waynesboro Drug Co.*, 19 A. B. R. 487, 157 Fed. 101 (D. C. Ga.).

Inferentially and obiter, *Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills., *aff'd sub nom. Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31): "Reading the above quoted part of the decree in the light of the prior proceedings which show that the court held, as a matter of law, that the specification was insufficient, and that no evidence was introduced, the meaning of the finding is 'that

the bankrupts have not been shown to have been guilty of any of the acts or omissions which would be a bar to a discharge.' In the absence of such a showing, it was the duty of the court, under § 14 (b), to grant the discharge (confirm the composition). Objections to discharge may be made by any 'party in interest.' That term certainly includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets."

6. There are contrary decisions as to the appealability of an order of refusal of confirmation. *Ex rel. Adler v. Hammond*, 4 A. B. R. 736, 104 Fed. 62 (C. C. A. Tenn.), holds, in a case where there were adversary parties, that such an order is appealable; whilst *Ross v. Saunders*, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.), holds, in a case where the judge on his own motion refused confirmation, that it is not appealable.

7. *Bank v. Doolittle*, 5 A. B. R. 736, 107 Fed. 236 (C. C. A. Tex.).

before the time set in the notices, precisely the same as in cases of opposition to a discharge.⁸

§ 2379. Ten Days Time after Appearance, for Filing Specifications.—Thereafter, within ten days time, unless longer time is given by the judge, the creditor must file written specifications of the grounds of his opposition to the confirmation of the composition, precisely as in case of discharge.⁹

§ 2380. Form and Allegations of Specifications Similar to Discharge.—The form and allegations of the creditor's specifications of his grounds of opposition to the confirmation of the composition follow, in general, those in opposition to discharge.¹⁰

DIVISION 3.

GROUND FOR OPPOSITION TO THE CONFIRMATION OF A COMPOSITION.

§ 2381. Three Grounds of Opposition.—The statute provides three grounds for refusing confirmation of a composition.

The judge must confirm a composition, if satisfied, first, that it is for the best interests of the creditors; second, that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and, third, that the offer and its acceptance are in good faith and have not been made or procured except as provided in the Act, nor made or procured by any means, promises or acts forbidden by the Act.¹¹

§ 2382. Statutory Grounds Requisite to Bar Confirmation on Merits.—Only such grounds as are prescribed by statute will suffice to prevent confirmation of a composition.¹²

8. Gen. Ord. XXXII: "A creditor opposing the application of a bankrupt for his discharge or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."

Adler v. Jones, 6 A. B. R. 248, 109 Fed. 967 (C. C. A. Tenn.).

9. Gen. Ord. No. XXXII.

Delay in order to permit liquidation of claim refused. In re Heinsfurter, 3 A. B. R. 109, 97 Fed. 198 (D. C. Iowa). In this case the court refused to delay confirmation to give time for a creditor to effect a liquidation of an unliquidated claim, because of laches, or prior disallowance by the Bank-

ruptcy Court itself and because of a preference.

10. Adler v. Jones, 6 A. B. R. 248, 109 Fed. 967 (C. C. A. Tenn.); Bk. v. Doolittle, 5 A. B. R. 736, 107 Fed. 236 (C. C. A. Tex.).

11. Bankr. Act, § 12 (b). See also, Bank v. Doolittle, 5 A. B. R. 736, 107 Fed. 236 (C. C. A. Tex.). Compare, interesting discussion of the functions of the judge in relation to compositions in Ross v. Saunders, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.), wherein the court refused to confirm a composition where merely the trustee informally showed him that various creditors had withdrawn their consents!

12. Bank v. Doolittle, 5 A. B. R. 741, 107 Fed. 236 (C. C. A. Tex.); In re Rudwick, 2 A. B. R. 114, 93 Fed. 787 (D. C. Mass.).

But the court may, for good cause, delay confirmation without refusing it;¹³ for instance, upon its own motion, for the purpose of ascertaining whether opposition to the confirmation has been bought off.¹⁴ And for irregularity of procedure and failure to comply with the statutory requirements, the court may refuse confirmation of a composition or may set it aside and reinstate the case;¹⁵ and may do so even on its own motion.

§ 2383. Burden of Proof on Opposing Creditor.—The burden of proof is on the creditor opposing the confirmation.¹⁶

In re Waynesboro Drug Co., 19 A. B. R. 487, 157 Fed. 101 (D. C. Ga.): "While it seems to be the rule in England that the decision of the majority of creditors on the question of 'interest' is final, unless fraud is disclosed * * * the provision just quoted requires that here the judge must be satisfied that the offer is for the best interests of creditors. It is his duty, then, to investigate the facts, independently of any agreement or conclusion they may have made. While this is true, the fact that a majority of the creditors have consented to the composition is *prima facie* evidence that it is for the best interest of all, yet any gross discrepancy between the offer and the amount to be reasonably expected from the sale of the assets will justify a refusal to confirm. * * * It is by no means clear that the balance remaining in the hands of the trustee, or due to him, will amount to more than the sum deposited in support of the composition. When, in addition to this, we consider the large depreciation—often below the estimates of the appraisers—in broken stocks of merchandise of this general character, and the uncertain values of the open accounts on the books of the company, the benefits which might result to creditors by a disapproval of the composition are gravely problematical. Indeed, a close analysis of the figures involved will demonstrate that the stock must bring 60 per cent. of its inventoried value, and the notes and accounts 33½ per cent. of their face value, in order to secure the creditors any appreciable advantage over that offered by the composition. Under all the circumstances, the court is not satisfied that these results could be obtained. Besides, due allowance should be made for the costs of administration, if the matter should proceed as usual in bankruptcy. This might materially deplete the sum to be apportioned among the creditors. When we further consider that the composition will accomplish the ever-meritorious result of avoiding the law's delay, will end the litigation, will discharge the bankrupt company—which has been guilty of no fraud—from its indebtedness, will permit its officials to engage in perhaps more profitable pursuits, and will enable the creditors to recover each an equal and not insignificant share of the sum due them by their unfortunate, but honest debtor, we must conclude that its approval is for the best interests of the creditors, and will also contribute in a wholesome way to the moral and financial status of cred-

13. Inferentially, In re Heinsfurter, 3 A. B. R. 109, 97 Fed. 198 (D. C. Iowa): In this case, however, delay was refused because of lack of a sufficient reason therefor.

14. In re Levy, 22 A. B. R. 769, 172 Fed. 780 (D. C. Mass.).

15. Obiter, Bank v. Doolittle, 5 A. B. R. 742, 107 Fed. 236 (C. C. A. Tex.).

16. Obiter, Bk. v. Doolittle, 5 A. B. R. 741, 107 Fed. 236 (C. C. A. Tex.); In re Waynesboro Drug Co., 19 A. B. R. 487, 157 Fed. 101 (D. C. Ga.); In re Barde and Levitt, 31 A. B. R. 161, 207 Fed. 654 (D. C. Ore.).

itor and debtor alike. Indeed, we believe that for just such cases as this, were compositions authorized by the law."

SUBDIVISION "A."

FIRST GROUND OF OPPOSITION TO CONFIRMATION OF A COMPOSITION.

§ 2384. First Ground: "Not for Best Interests of Creditors."—

Where the composition is not for the best interests of the creditors it may be refused.¹⁷

§ 2385. Test of "Best Interest"—Whether More Could Be Realized by Ordinary Administration.—The test is not whether the bankrupt could give more, but is whether or not more could be realized by creditors if the assets were to be administered in due course.¹⁸

Adler v. Jones, 6 A. B. R. 248, 109 Fed. 967 (C. C. A. Tenn.): "It comes, then, to this: if the court is satisfied upon the hearing that the composition offered would pay creditors very considerably less than they might reasonably be expected to realize in the administration of the assets in due course, then the composition is not for the best interest of creditors. In determining this question the courts will doubtless be influenced by the consideration that man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in course of judicial proceedings with compulsory sales and expense of administration."

Obiter U. S. ex rel. Adler v. Hammond, 4 A. B. R. 736, 104 Fed. 62 (C. C. A. Tenn.): "Obviously this amount is contemplated as a sum which will be the equivalent of the assets which would be obtained by the other and more tedious course."

[1867] *In re Morris*, Fed. Cases No. 7,303, 11 N. B. Reg. 443: "In the absence of fraud and concealment the question for the court seems to be not whether the debtor might have offered more, but whether the estate would pay more in bankruptcy."

Thus, if the composition offered would pay creditors considerably less than they might reasonably expect to realize in the administration of the assets in due course, then the composition is manifestly not for the best interests of the creditors,¹⁹ even though the amount expected to be realized be dependent on the successful outcome of a pending suit to set aside a fraudulent transfer.²⁰

17. Bankr. Act, § 12 (b). *In re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.); *In re Woodend*, 12 A. B. R. 768, 133 Fed. 593 (D. C. N. Y.); *Adler v. Jones*, 6 A. B. R. 248, 109 Fed. 967 (C. C. A. Tenn.). *Obiter, U. S. ex rel. Adler v. Hammond*, 4 A. B. R. 736, 104 Fed. 62 (C. C. A. Tenn.). *Obiter, confirmation being granted, In re Arrington Co.*, 8 A. B. R. 66, 113 Fed. 498 (D. C. Va.). *Obiter, confirmation being granted, In re Criterion Watch Case Co.*, 8 A. B. R. 206 (Ref. N. Y.). *In re Charles E. Hoxie et al.*, 25 A. B. R. 32, 180 Fed. 508 (D. C. Me.).

18. Inferentially, *In re Criterion*

Watch Case Co., 8 A. B. R. 206 (Ref. N. Y.); *In re Arrington Co.*, 8 A. B. R. 66, 113 Fed. 498 (D. C. Va.); instance, *In re Martin*, 18 A. B. R. 250 (D. C. N. Y.); [1867] *In re Whipple*, Fed. Cases No. 17,513; [1867] *In re Weber Furniture Co.*, Fed. Cases No. 17,330; inferentially, *In re Hoxie*, 25 A. B. R. 32, 180 Fed. 508 (D. C. Me.).

19. *Adler v. Jones*, 6 A. B. R. 248, 109 Fed. 967 (C. C. A. Tenn.); [1867] *In re Reiman*, 11 B. Reg. 21, 13 B. Reg. 128.

20. *Adler v. Jones*, 6 A. B. R. 248, 109 Fed. 967 (C. C. A. Tenn.).

Likewise, where it appears that preferential payments have been made and there is reasonable cause to believe that such preferences could be recovered, and it also appears, that with such recovery the creditors will receive a greater percentage than offered in the proposed composition, confirmation should be refused.²¹ But the mere allegation of a preference is insufficient in opposition to a composition unless a *prima facie* case for its recovery is made out.²²

§ 2386. Creditors' Acceptance of Offer Not to Be Lightly Interfered with.—The decision of the majority of the creditors usually is conclusive as to "best interest" in the amount of the composition, when such judgment is exercised by them in good faith and there is nothing to indicate fraud, accident or mistake.²³

Obiter [confirmation refused on other grounds], *In re Barde & Levitt*, 31 A. B. R. 161, 207 Fed. 654 (D. C. Ore.): "The proposed composition here has the approval of a large number of the creditors, and this is in itself *prima facie* evidence that it is for the best interests of all. Were this the only objection, I should be inclined to direct a confirmation."

[1867] *In re Weber Furniture Co.*, Fed. Cases No. 17,330 (on review No. 17,331): "But where a composition deed has been signed by a large majority of the creditors upon a full consideration of the condition of the debtor, I should be very reluctant to overrule their judgment simply because I thought the estate would yield a larger dividend in bankruptcy. Much would depend upon the character of the property and the state of the market. In the case above cited Judge Lowell intimated 'that a difference of five per cent. upon the amount of the debts and the probable amount of the assets would not be sufficient to induce me to reject the resolution.' I would go even further than that, and say that where the property consisted of real estate or of goods, the value of which depended upon the caprices of fashion, or other like contingencies, I would not overrule the discretion of the creditors, fairly exercised, if the difference were ten or even fifteen per cent."

But it is not always conclusive.²⁴

In re Hoxie, et al., 25 A. B. R. 32, 180 Fed. 508 (D. C. Me.): "Their (creditors) assent does not relieve the court from passing on the question whether the composition is for the best interest of all the creditors. This question is addressed to the judicial discretion of the court, and from its conclusion either party may appeal."

In re Woodend, 12 A. B. R. 768, 133 Fed. 593 (D. C. N. Y.): "The actual composition proposed, therefore, as I understand it, consists of an offer to pay debts with worthless stock, the acceptance of which will impose a heavy personal liability. For instance, a creditor for \$1000 is to be forced to accept in full settlement eleven shares, worth \$2.75, the acceptance of which would involve him in a personal liability to the extent of \$1,100. I think that no such composition should be confirmed. It is urged that a large majority of the

²¹. *In re McLellan*, 30 A. B. R. 325, 204 Fed. 482 (D. C. N. Y.).

²². *In re McLellan*, 30 A. B. R. 325, 204 Fed. 482 (D. C. N. Y.).

²³. *In re Arrington Co.*, 8 A. B. R. 66, 113 Fed. 498 (D. C. Va.).

²⁴. See ante, § 2385. *In re Barde & Levitt*, 31 A. B. R. 161, 207 Fed. 654 (D. C. Ore.).

ditors have assented to it. Any creditors who choose to make such a statement are free to do so, but in my opinion this court should not compel a dissenting creditor to accept such an offer."

SUBDIVISION "B."

SECOND GROUND OF OPPOSITION TO CONFIRMATION OF A COMPOSITION.

2387. Second Ground—Commission of Act Barring Discharge, and Composition.—If the bankrupt has committed any of the acts that would be a bar to his discharge, confirmation of his composition will be refused, no matter how beneficial the composition would be to his creditors, nor how few creditors are opposing the confirmation.²⁵

In re Godwin, 10 A. B. R. 252, 122 Fed. 111 (D. C. Penn.): "It is very likely that the creditors may lose by the defeat of the proposed composition; but no consideration cannot be allowed to influence the court in deciding whether the bankrupt has been 'guilty of any of the acts, or failed to perform any of his duties, which would be a bar to his discharge.' Bankruptcy Act, § 12, cl. 1.

I agree with the learned referee that the testimony establishes the fact satisfactorily that the bankrupt has committed one of the offenses specified in § 4, clause 'b.' He has, 'with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained.' This being so, I think the act requires me to refuse approval of the composition, without regard to the question whether the creditors would be benefited thereby; and the fact that only one creditor is actively objecting, while a large majority is in favor of taking what the bankrupt offers, is of no importance in the present inquiry.

The report of the referee is approved and the confirmation of the composition is refused."

In re Olman, 13 A. B. R. 398 (D. C. Ohio): "The absurdity of the explanation offered compels the belief that the bankrupts failed to keep books from which their true condition might be ascertained, and withheld such books as they did keep for the purpose of concealing their true financial condition, and to enable them to conceal property from their creditors, and that it was done with a view to force a profitable compromise with the creditors, or ultimately to secure a discharge from their debts through proceedings in bankruptcy.

The application to confirm the composition therefore will be refused."

In re Comstock, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.): "It is clear that, if the bankrupt has been guilty of any of the acts which would be a bar

5. Instance where "False Oath" was given, but not proved, In re Cohen, A. B. R. 85, 149 Fed. 908 (D. C. N. Y.).

Instance, where partners on the eve of bankruptcy strip the firm of all its assets, such taking was held to be a transfer, removal or concealment of property of the bankrupts, made with intent to hinder, delay, and defraud their creditors, and a composition was refused. In re Burman & Welling, 32 A. B. R. 62, 210 Fed. 512 (D. C. Mass.). Instance, concealment of assets

urged, but no fraudulent intent proved. In re Jacobson & Son Co., 28 A. B. R. 492, 196 Fed. 949 (C. C. A. N. J.).

Instance, "failure to keep books of account or records from which his true condition might be ascertained." In re Barde & Levitt, 31 A. B. R. 161, 207 Fed. 654 (D. C. Ore.).

Unsuccessful Opposition to Composition for False Statement, Not Res Judicata That Same Debt Was Not Incurred by False Pretenses.—Compare ante, § 1774¼, and post, §§ 2750½, 2750¾.

to a discharge, the court is without power to confirm a composition, even if satisfied that it would be for the best interests of the creditors to do so. Since the confirmation of a composition discharges the bankrupt (§ 14c), it is reasonable that the same grounds which prevent a discharge on a direct petition should also prevent a discharge on an application for confirmation of a composition."

Thus, where the bankrupt has obtained property on credit upon a materially false statement in writing made for the purpose of obtaining property on credit, confirmation may be refused.²⁶

In this connection it is well to call attention to the offense of presenting a false claim for proof, or of using any such claim in composition, personally or by agent, proxy or attorney, or as agent, proxy or attorney. Although there appear to be no cases decided under the present law upon the point, such use of false claims is deemed to be more or less frequent in composition cases, and would be a bar to confirmation.

In compositions before adjudication of bankruptcy, permitted by the Amendment of 1910, manifestly concealment of assets from the trustee cannot be urged as a bar to the composition.

And, unless the bankrupt has committed some one or more of the acts specified in § 14 (b), the composition *must* be confirmed where the court rules as to procedure have been complied with, provided, of course, it be "for the best interests of creditors" and "the offer or its acceptance has not been in bad faith nor been improperly procured."²⁷

And, since the violation of a criminal law of a State is not made a ground for refusal of a discharge, it cannot be urged in opposition to the confirmation of a composition.²⁸

SUBDIVISION "C."

THIRD GROUND OF OPPOSITION TO CONFIRMATION OF A COMPOSITION.

§ 2388. Third Ground—Offer or Acceptance Not in Good Faith or Procured Improperly.—If the offer or its acceptance is not in good faith or has been made or procured improperly, confirmation may be refused.²⁹

²⁶. Instance *In re Griffin*, 25 A. B. R. 206, 180 Fed. 792 (D. C. Ga.); instance where urged but not proved. *In re Seligman*, 20 A. B. R. 774, 163 Fed. 549 (D. C. N. Y.); *In re McLellan*, 30 A. B. R. 325, 204 Fed. 482 (D. C. N. Y.).

²⁷. *Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills., affirmed sub nom. *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31: "In the absence of such a showing it was the duty of the court, under § 14 (b), to grant the discharge (confirm the composition)."

²⁸. *In re McLellan*, 30 A. B. R. 325, 204 Fed. 482 (D. C. N. Y.).

²⁹. Bankr. Act, § 12 (b).

As to the effect of a secret advantage given under a composition, see *Batchelder v. Whitmore*, 10 A. B. R. 641, 122 Fed. 355 (C. C. A. Mass.). Compare same subject where composition, in which the secret advantage was given, occurred before bankruptcy. *In re Chaplin*, 8 A. B. R. 121, 115 Fed. 162 (D. C. Mass.).

Also, same subject, *McCormick v. Solinsky*, 18 A. B. R. 540, 152 Fed. 984 (C. C. A. Tex.), where the paying of

Thus, where a trustee was interested in a scheme of composition with creditors, and by concealment or false representations, in aid of the bankrupt, induced creditors to act contrary to their interests, a composition thus entered into was annulled.³⁰

a bank's debt in full as consideration for its advancing the money to make the composition was declared illegal, but such doctrine has been expressly repudiated by the Supreme Court in *Zavelo v. Reeves*, 227 U. S. 625, 29 A. B. R. 493, quoted at § 2400.

30. In re *Wrisly Co.*, 13 A. B. R. 193, 133 Fed. 388 (C. C. A. Ills.).

The bankrupt's attorney is not necessarily disqualified from collecting claims for the trustee in composition cases and the attorney may recover for such services. *Keyes v. McKirrow*, 9 A. B. R. 322, 180 Mass. 261.

Secret Agreement to Pay One Cred-

itor More than the Rest.—The essence of a composition is that all creditors are to share equally therein, and a secret agreement, whereby one creditor is to receive a larger percentage of his debt than the other creditors are to receive is void as against public policy; such being the holding where the transferee of the bankrupt estate, holding it as trustee for creditors in the composition, promised one creditor to guarantee his claim in full, the court adding, though by obiter dictum, that such agreement did not avoid the composition. *Jacobs v. Siff*, 27 A. B. R. 189 (N. Y. Sup. Ct.).

CHAPTER XLVIII.

DISTRIBUTION AND PROCEEDINGS AFTER CONFIRMATION IN COMPOSITION CASES.

Synopsis of Chapter.

- § 2389. Distribution, upon Confirmation of Composition.
- § 2390. Judge Directs Manner of Distribution.
- § 2391. Referee Divested of Jurisdiction by Confirmation of Composition, Except as Otherwise Ordered by Judge.
- § 2392. Distributing Agent Usually Appointed.
- § 2393. All Creditors to Share, Whether Proofs Filed or Allowed or Not, unless Limited by Order of Distribution.
- § 2393½. Mistake in Amount of Creditor's Claim.
- § 2394. Whether Bound by Year's Limitation for Filing Claim.
- § 2395. Secured Creditors to Participate to Amount of Deficit.
- § 2396. But Judge May Limit Time and Require Filing of Proofs of Claims.
- § 2397. Closing of Case after Distribution Completed.
- § 2398. Jurisdiction to Determine Ownership of Property in Custody of Court Not Divested.
- § 2398½. Confirmation Refused.

§ 2389. **Distribution, upon Confirmation of Composition.**—Upon the confirmation of a composition, the consideration is to be distributed as the judge directs, and the case dismissed. Whenever a composition is not confirmed, the estate is to be administered in bankruptcy as provided in the Act.¹

§ 2390. **Judge Directs Manner of Distribution.**—The judge directs the manner of distribution.²

§ 2391. **Referee Divested of Jurisdiction by Confirmation of Composition, Except as Otherwise Ordered by Judge.**—The referee is divested of jurisdiction by the confirmation of a composition.³

In *re Fox*, 6 A. B. R. 526 (Ref. Ohio, affirmed by D. C.): "Section 12e of the Bankruptcy Act provides that 'upon the confirmation of a composition the consideration shall be distributed as the judge shall direct and the case dismissed. Whenever a composition is not confirmed the estate shall be administered in bankruptcy as herein provided.'

"This section, taken in conjunction with the well defined reservation to the judge contained in § 38 (4) of all 'questions arising out of the applications of bankrupts for compositions,' sufficiently indicates that the confirmation of the composition in this case divested the referee of further jurisdiction and

1. Bankr. Act, § 12 (e). In *re Lane*, 11 A. B. R. 137, 125 Fed. 772 (D. C. Mass.).

2. Bankr. Act § 12 (e); In *re Lane*, 11 A. B. R. 137, 125 Fed. 772 (D. C. Mass.).

3. In *re Cooper Bros.*, 20 A. B. R. 634, 159 Fed. 956 (D. C. N. Y.). But compare, apparently *contra*, In *re Sonabend*, 18 A. B. R. 117 (Ref. Mass.).

placed the composition fund and all questions relating to its distribution—including necessarily the allowance of contested claims—directly under the supervision of the judge himself, as well as all questions arising more specifically out of the consideration of the advisability of approving the composition.”

But, undoubtedly, the judge may, in his order, direct the referee to determine the validity of claims and to perform other functions relative to the distribution; but this would be by virtue of the order and not because he is the referee.⁴

§ 2392. Distributing Agent Usually Appointed.—Usually the judge appoints a distributing agent to take charge of the composition fund and disburse it in accordance with the order of confirmation. The clerk of the court or referee, or trustee or any other person may be such distributing agent. The distributing agent may be allowed compensation for his services, under the broad authority that the distribution shall be accomplished “as the judge shall direct.”

§ 2393. All Creditors to Share, Whether Proofs Filed or Allowed or Not, unless Limited by Order of Distribution.—All creditors are entitled to share, even those who did not file their claims before the confirmation.⁵

It is also a question, whether, unless the judge has ordered otherwise, it is not the duty of the distributing agent appointed by the judge, to pay the percentage to the creditors whose claims have not yet been filed, according to the schedules, without demand or proof of claim, subject simply to correction on application to the judge.⁶

§ 2393½. Mistake in Amount of Creditor's Claim.—Where a creditor by mistake presented a claim before the composition for a lesser amount than was actually due, and received the percentage thereon after composition, the amount ordered deposited on the composition having been figured on the basis of the lesser amount, the creditor was held not to be entitled to an order setting aside the composition, for there was no fraud;⁷ nor to an order on the distributing agent to procure more money, for he had

4. *Obiter*, In re Fox, 6 A. B. R. 526 (Ref. Ohio).

5. In re Fox, 6 A. B. R. 525 (Ref. Ohio, affirmed by D. C.). Compare, inferentially, to same effect, In re Rider, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.).

Debts Not Scheduled.—See post, § 2761, et seq. Compare, where creditor's claim not scheduled, and not provided for in deposit, after confirmation he was not allowed to share ratably with other creditors thus diminishing the fund which they had agreed

upon, but was relegated to whatever surplus which might remain after paying the dividends provided for in the order of distribution and expenses, or to such other remedy as he might possess. In re Ennis & Stoppani, 25 A. B. R. 383, 183 Fed. 859 (D. C. N. Y.).

6. In re Fox, 6 A. B. R. 525 (Ref. Ohio, affirmed by D. C.).

7. In re Wilkins, 27 A. B. R. 235, 191 Fed. 94 (D. C. N. Y.). Compare, on principle, In re Ennis & Stoppani, 25 A. B. R. 383, 183 Fed. 859 (D. C. N. Y.); In re French, 25 A. B. R. 77, 181 Fed. 583 (D. C. Mass.).

fulfilled the order of distribution; nor to an order on the bankrupts, for the composition operated as a discharge.⁸

But it may well be doubted that the error of the creditor released the bankrupts; they knew precisely how much was due; they made an offer of composition whereby they unequivocally offered to pay their creditors a certain percentage on each claim; and it was an order framed by their attorneys confirming this offer that operated as the discharge. However, it is possible that the remedy lay in the state court, in a suit to enforce the claim, rather than in the bankruptcy court.

§ 2394. Whether Bound by Year's Limitation for Filing Claims.

—It is also a question whether, unless the judge in his order has prescribed a limit, creditors are limited by the statutory period of one year from the date of the adjudication in making demand for their respective shares. The limitation of one year was made in the interests of all the creditors as a body; but, in compositions, it is a matter of indifference to other creditors when any one particular creditor is paid his share.⁹

In *re Fox*, 6 A. B. R. 527 (Ref. Ohio, affirmed by D. C.): "In the first place the fascinating analogy between the complete distribution of an estate in dividends before the expiration of the allotted year and the distribution of composition money to those only who have promptly filed their claims does not stand under close inspection. In compositions the amount each creditor is to receive is fixed and his delay in calling for it hurts no one but himself, whilst in the payment of dividends no one can get any pay at all until the rate is determined; and, if the rate could not be determined until the last straggler had filed his claim, then no one could get his pay until the end of the year. For this reason the law says the laggard claimant of a dividend must suffer rather than all the others. But such considerations do not apply to compositions; for who is hurt if the creditor does take the whole year or more to demand his money? No one but himself.

"In the next place, the creditors and the amounts of their claims to be covered by the composition arrangement may not, as is mistakenly contended, be different from those set forth in the list already filed as part of the bankrupt's original schedules; nor would it be necessary for them to be different in order to avoid the contingency of a total frustration of a desirable composition through some unscrupulous creditor making an excessive claim. This is so for the reason that the 'list of creditors' required by § 7 of the act to be filed by bankrupts with their petitions need not show the amounts claimed by the respective creditors, though it may do so, but need show merely the respective amounts 'due,' that is to say, rightfully owing, to each of them. So it is evident no unjust claims need be taken into account in fixing the deposit, even if it is the schedules that are required to be taken for the basis; for as to the claims already filed, the order of allowance itself determines their justness; and as to those not filed, the bankrupt's own estimate of their justness is controlling, and he has no one to blame but himself if he has to make a deposit to cover some scheduled claims that are unjust.

"Again, there is no half-way stop between the position that all just claims

8. In *re Cooper Bros.*, 20 A. B. R. 634, 159 Fed. 956 (D. C. N. V.).

9. Contra, In *re Lane*, 11 A. B. R. 136 (D. C. Mass.).

must be allowed to participate in the composition fund, and the position that only those filed before the filing of the petition for confirmation may participate. Thus it would be inconsistent with either position to hold that those proved after the petition was filed and before the judge had acted on it should be included in the distribution. There would exist necessity, in such an event, for adding to the deposit and for amending the petition to correspond therewith, each time a new claim was added, up to the very day of the confirmation hearing, and the bankrupts would still be laboring under the burden of the uncertainties complained of, in making their offer of composition."

Contra, *In re Brown*, 10 A. B. R. 589, 123 Fed. 336 (D. C. Colo.): "The question presented by these petitions is whether, in a case where composition is effected, a creditor must, under § 57 of the Bankrupt Act, prove his claim within one year from the date of adjudication. That he must do so in ordinary cases where composition is not made, has been the uniform rule since the act was passed. *In re Meyer Stein* (C. C.), 1 Am. B. R. 662, 94 Fed. 124. The rule must be the same in a case where composition is made. Under section 12, the bankrupt may offer terms of composition 'after but not before he has been examined in open court, or at a meeting of his creditors.' The creditors here referred to are such as have proved their claims, for no others can participate in a meeting of creditors. Clause 'b' of this section provides for confirmation of the composition 'after but not before it has been accepted in writing by a majority in number of all creditors whose claims have been allowed.' Under clause 'e,' if the composition shall fail, 'the estate shall be administered in bankruptcy as herein provided.' As to the proof of claims, the course of proceeding is precisely the same whether there be composition, or proceedings are carried through in ordinary course. Only those creditors who prove their claims within one year from the date of adjudication can have dividends from the estate, or assert a right to share in the funds paid in composition. The officers of the court cannot know what amount should be paid to a creditor, or, indeed, who are creditors, except upon proof of their claims in the time and manner provided by law. The bankrupt is entitled to the money remaining in court unclaimed after the expiration of the year in which proof of claims could be made, and the creditor cannot be heard to say that it was not in fault in respect to the failure to present its claim. The language of the statute permits no exceptions to its terms. 'Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication.' No language could be more explicit, and no court can doubt as to its meaning."

Contra, *In re French*, 25 A. B. R. 77, 181 Fed. 583 (D. C. Mass.): "In no event, as it seems to me, would it be proper or just to include the present petitioners in any distribution of the amount now deposited. The result of doing so would be to benefit these petitioners, who have let the time for taking action in these proceedings pass, notwithstanding repeated notices, at the expense of the creditors who have been properly diligent, and it would amount to a substitution by the court, in place of the composition agreement for a given percentage, of an agreement for a lower percentage which very probably never would have been voted."

§ 2395. Secured Creditors to Participate to Amount of Deficit.

—Secured creditors are entitled to their respective shares to the extent of any deficit left after application of their security on the debt.

[1867] *Paret v. Ticknor*, 16 N. B. Reg. 315: "I am of opinion myself that the compromise provisions of bankruptcy design that every creditor shall receive

the same proportion of his debt; and I am of opinion as regards the parties who shall receive, that the secured creditor is a creditor for that purpose for all that is not satisfied by his security; and I am of the opinion that whenever this fact is ascertained, even after the compromise, that remainder constitutes a debt against the bankrupt, of which he shall pay the same proportion to that creditor that he has paid to the unsecured creditors."

[1867] *Cayanna v. Bassett*, 3 Fed. Rep. 215: "Composition proceedings do not operate to deprive a secured creditor of the right, after exhausting his own security, and ascertaining the amount unpaid, to assert against the bankrupt a claim for the deficiency, and such claims may be enforced through the instrumentality of an execution issued against the property of the debtor on the deficient judgment; complainant had a right to hold on to her security, and as a secured creditor she could not properly participate in the composition proceedings; she could not be compelled to surrender her security, and then come in and prove her claim, nor was it incumbent on her to have her security valued and then to make proof of any balance; the bankrupts knew or should have known that there was a liability that the security would not pay the indebtedness; they were chargeable with notice that such a contingency might arise, and if they desired to put complainant in position where the complainant's proceedings would operate upon hers, they might have applied to the court for proceedings compulsory in their nature, to have the security valued; not having done so, there remained a liability that in case the security should prove inadequate, complainant would have the right as to any deficiency, to compel the payment of the same to the extent of the percentage paid to unsecured creditors under the composition."

In *re Kahn*, 9 A. B. R. 113 (Ref. N. Y., approved by D. C.): "It thus would appear that the bankrupt must be willing, in view of the situation, to assume the risk and liability of being compelled to make good hereafter to such mortgage creditors, the same percentage of such deficiency, if any could arise, as he is now offering to pay to his body of creditors; and the mortgage creditors are not injuriously affected by the composition, because as is pointed out in the last case cited, they could by proper proceedings in the court, have their security valued and present a provable claim for the difference between the amount of their security and the amount of their respective debts."

Secured creditors either may receive their dividends with the others upon complying with the statutory provisions regarding the determination of the value of securities, § 57; or, perhaps, if they do not do so, doubtless the bankrupt would be still liable to them for their dividend, when the deficit should be ascertained.¹⁰

§ 2396. But Judge May Limit Time and Require Filing of Proofs of Claims.—But the judge may, by order, undoubtedly fix a limit for creditors to make demand, and may prescribe that creditors shall make due proof of claims; and may direct, in other ways, the manner of distribution.¹¹

§ 2397. Closing of Case after Distribution Completed.—After a composition has been confirmed and the consideration distributed, the

10. In *re Kahn*, 9 A. B. R. 113 (Ref. approved by D. C.).

11. Bankr. Act, § 12 (e); obiter, In *re Fox*, 6 A. B. R. 525 (Ref. Ohio, affirmed by D. C.).

case is closed. The statute says the case is to be "dismissed." The dismissal either refers merely to a dismissal or closing of the original bankruptcy proceedings before the referee, or is a misnomer; for composition is precisely as much a way of administering an estate and discharging a bankrupt as any other way.¹²

In *re Fox*, 6 A. B. R. 529 (Ref. Ohio, affirmed by D. C.): "Nor is it proper to consider that there is no longer a case in court. There still must remain a case pending somewhere so long as the deposit fund is not paid out; there must be some case in which the distributing agent may file his report; it is not conceivable that he could be existing stark alone and unconnected with any case in court. The reporter in his note to the case, *In re Rider*, 3 Am. B. R. 178, is in this regard wholly in error. Section 12e, in declaring the procedure, does not mean that the case is to be dismissed immediately upon the entry of the order of confirmation. It means that thereafter, upon completion of the distribution, the case is to be dismissed—not beforehand. Such is certainly the reasonable intentment. And the question still remains: How long shall the case be kept pending thereafter? The answer is, until the distribution has been completed, until all the just creditors have been paid their percentages."

And it would seem necessary that the distributing agent should make a report of his doings and have it approved; otherwise would occur the anomaly of a court proceeding in the distribution of funds without a "case" in which the papers should be filed!

The case may not be dismissed until the terms of the composition have been carried out. Not only were the decisions under the Bankruptcy Act of 1867 to this effect¹³ but also the context of § 12e of the present act indicates that the distribution of the consideration is to be accomplished before the dismissal of the case.

When the terms of the composition have not been carried out, it is a question whether the creditor may disregard the composition and sue directly for the debt, or must first appear in the bankruptcy proceedings and have the composition order annulled.¹⁴

§ 2398. Jurisdiction to Determine Ownership of Property in Custody of Court Not Divested.—Composition does not affect the jurisdiction of the bankruptcy court to determine the ownership of property in its custody and claimed adversely.¹⁵ Adverse claimants to property in the

12. But compare, *Bank v. Doolittle*, 5 A. B. R. 741, 107 Fed. 236 (C. C. A. Tex.). Also, compare, *In re Rider*, 3 A. B. R. 178, 96 Fed. 808 (D. C. N. Y.).

13. See ante, § 2371½.

14. Compare (1867) *In re Bayly & Pond*, 19 Nat. Bankr. Reg. 73.

15. *In re J. S. Winship Co.*, 9 A. B. R. 638, 120 Fed. 93 (C. C. A. Ills.): In this case the court held that where a composition with the creditors of an alleged bankrupt is carried out and no adjudication in bankruptcy is made in

the cause, property claimed to have been leased to the alleged bankrupt, and taken possession of by the receiver in bankruptcy, must be returned to the claimant. The property being in custodia legis, taken for the benefit of creditors and no longer necessary to be held for them, the court may summarily determine the disposition thereof, and no technicality will be permitted to intervene to prevent a just determination of that question.

custody of the bankruptcy court may have their rights determined by the bankruptcy court, notwithstanding a composition is effected, and even though no adjudication of bankruptcy is ever entered.

Thus, where a trustee in bankruptcy had taken over assets from a prior assignee in insolvency, under an order which made the surrender subject, in general terms, to any existing claims and saved the assignee harmless therefrom, the bankruptcy court held that the trustee, having been notified of the particular claim, even though the order itself did not specifically mention it, was personally bound to the adverse claimant for turning back the assets to the bankrupt upon confirmation of a composition, the trustee, in his turn, being relegated merely to whatever rights might exist against the bankrupt.

In *re Cadenas & Coe*, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.): "Therefore, the trustee, being charged in general with equities upon the fund, put it out of his hands without seeking to protect those equities by reserving any part of the fund or of the consideration. If he did this without knowledge of the existence of the claim, I do not consider that the terms of the order charged him; but, if he had adequate knowledge of the claim, he was in the same position as any other person who with knowledge of existing equities attaching to a res disposes of the res—that is, he became responsible as trustee to the person injured. * * * This correspondence leaves no doubt that the trustee had the fullest notice of the claim before the composition was confirmed and went on without advising the petitioner of the composition till he supposed it was too late. Could there be a more absolute disregard of the petitioner's rights guaranteed him specifically by this court?"

§ 2398½. **Confirmation Refused.**—Where confirmation of the composition is refused, the estate is to be administered in bankruptcy as in other cases.¹⁶

16. Bankr. Act, § 12(e): "Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

CHAPTER XLIX.

SETTING ASIDE OF COMPOSITION AND APPEALS OF COMPOSITION MATTERS.

Synopsis of Chapter.

DIVISION 1.

- § 2399. Court's Power to Set Aside Confirmation for Irregularity.
- § 2400. Setting Aside Confirmation on Application of Parties.
- § 2401. Must Be Applied for within Six Months.
- § 2402. What Not Estoppel of Creditor.
- § 2403. Burden of Proof on Creditor.
- § 2404. Only "Parties in Interest" Competent to Petition for Setting Aside.
- § 2405. Principles and Practice on Revocation of Discharge, Whether Applicable.

DIVISION 2.

- § 2406. Petition to Set Aside Composition.
- § 2407. Leave to File Petition Granted unless Lack of Merit Appears on Face.
- § 2408. Reference to Special Master.
- § 2409. No Jury Trial.
- § 2410. Consideration Need Not Be Tendered Back.
- § 2411. Ignorance of Fraud Sufficiently Alleged in General Terms.

DIVISION 3.

- § 2412. Appeals of Composition Matters.

DIVISION 1.

PRINCIPLES INVOLVED AND PARTIES COMPETENT TO PETITION.

§ 2399. **Court's Power to Set Aside Confirmation for Irregularity.**—The judge retains the same power to set aside for irregularity orders of confirmation of compositions and to reinstate cases that he has in relation to other matters.¹

§ 2400. **Setting Aside Confirmation on Application of Parties.**—The judge may, upon the application of parties in interest, filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of the composition.²

Thus, it has been held sufficient ground for setting aside the confirmation that the trustee was interested in a scheme of composition, and by concealment or false representations in aid of the bankrupt, had induced creditors to act contrary to their interest.³ Likewise, the secret giving of a greater percentage to some creditors than to the rest, is sufficient ground.⁴

1. *Bank v. Doolittle*, 5 A. B. R. 742, 107 Fed. 236 (C. C. A. Tex.). Compare ante, § 2367½; compare post, § 2480.

2. Bankr. Act, § 13; *In re Rudwick*, 2 A. B. R. 114, 93 Fed. 787 (D. C. Mass.); *Obiter*, *Zavelo v. Reeves*, 227 U. S. 625, 29 A. B. R. 493.

3. *In re Wrisley Co.*, 13 A. B. R. 193, 133 Fed. 388 (C. C. A. Ills.).

4. *Obiter*, *In re Sacharoff & Kleiner*, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

Compare holdings that while an executory agreement to give one creditor a secret advantage over other

It was ruled under the Bankruptcy Act of 1867 that a secret advantage given to a creditor for his vote would make the composition void.⁵

But, inasmuch as the Act contemplates that the bankrupt may acquire the money for the purposes of the composition by use of his credit, it is not an unlawful advantage secretly obtained over other creditors that the bankrupt in consideration of a loan with which to make the deposit for the composition, promises to pay the debt of one creditor in full after the composition: it is simply additional compensation for the loan.^{5a}

Zavelo v. Reeves, 227 U. S. 625, 29 A. B. R. 493: "It is not contended that the record imports a secret or fraudulent agreement between the bankrupt and the plaintiffs at the expense of other creditors. The State Court construed the replications as not averring secrecy or fraud, saying (171 Ala. 408): 'That an advantage accrued to plaintiffs as the result of the loan is true, but that it came as a result of fraud, collusion, or extortion, cannot be read from these replications. On the contrary, the advantage, so far as the pleadings show, was the result of the advancement made by way of the loan described. There is nothing in the replications on which to rest a conclusion that anything other than the loan induced the promise relied on for recovery here.' This construction of the pleadings is not disputed here. We therefore are not in this case concerned with the general equitable principle that composition agreements are invalid if based upon or procured by a secret arrangement with one or more favored creditors, in violation of the equality and reciprocity upon which such an agreement is avowedly based."

This doctrine is not in conflict with the rule that composition agreements are invalid if based on or procured by a secret arrangement with one or more favored creditors in violation of the equality and reciprocity upon which such agreements are avowedly based.⁶

Either the concealment of assets, or the making of a false oath to the schedules in bankruptcy constitutes a fraud which will warrant the setting aside of a composition.⁷ But it was held to be insufficient grounds for setting it aside that the complaining creditor was not notified and had no information of the bankruptcy, even where the deposit does not cover his claim.⁸

§ 2401. Must Be Applied for within Six Months.—The application

creditors is void as against public policy, it does not avoid the composition itself. *Hanover National Bank v. Blake*, 142 N. Y. 404 (N. Y. Ct. of Appeals); *Jacobs v. Siff*, 27 A. B. R. 189, N. Y. Supp. (N. Y. Sup. Ct.) However, where the secret agreement is executed, the other innocent creditors may elect to refuse to be bound by the composition agreement. *Hanover National Bank v. Blake*, 142 N. Y. 404.

5. [1867] *In re Sawyer*, 14 Nat. Bankr. Reg. 241.

5a. Such an arrangement had been declared illegal in *McCormick v. Solinsky*, 18 A. B. R. 540, 152 Fed. 984 (C. C. A. Tex.).

6. *Zavelo v. Reeves*, 227 U. S. 625, 29 A. B. R. 493, quoted *supra*.

7. *In re Kaplan*, 29 A. B. R. 54 (Sp. M. Pa.).

8. *In re Rudwick*, 2 A. B. R. 114, 93 Fed. 787 (D. C. Mass.); *In re Abrams & Rubins*, 23 A. B. R. 25, 173 Fed. 430 (D. C. N. Y.). Compare *ante*, § 2367½.

to set aside a composition must be filed within six months after the confirmation.⁹

And merely that the applicant prays also for an order setting aside the "discharge" will not operate to extend the time from six months to the "one year" limited for revoking a discharge; for, whilst the confirmation of a composition is in effect a "discharge," it is so by operation of law and is not a "discharge" proper.

In *re Jersey Island Packing Co.*, 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.): "The fact that the petitioner also asks that the bankrupt's discharge resulting by operation of law from the confirmation of the composition referred to may also be set aside and annulled does not bring this proceeding within § 15 of the Bankruptcy Act, which provides that a judge may, 'upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it, if upon a trial it shall be made to appear that it was obtained through the fraud of the bankrupt,' etc. This section does not apply in a case such as this, where the discharge of the bankrupt results by operation of law from the confirmation of the bankrupt's offer of composition."

§ 2402. What Not Estoppel of Creditor.—A creditor who is moving to set aside a composition on the ground of fraud, is not estopped by having commenced an action at law on his debt. The petition to set aside the composition should not be dismissed on that account, nor should the creditor be required to elect as to his remedies.¹⁰ Nor does the fact that the order confirming the composition recites that the bankrupt has not been guilty of any acts, or failed to perform any duties which would bar his discharge, and that the offer and its acceptance are in good faith, and have not been made or procured by means, promises or acts contrary to the Act, preclude the setting aside of the compensation for fraud in procuring it, discovered since confirmation.¹¹

And a creditor will not be estopped by his laches from seeking to set aside a composition on the ground of fraud unless it can be shown that he was in possession of the information or that he deliberately ignored the opportunity to become acquainted with the facts.¹² But where, with a knowledge of all the facts, a composition is accepted, and it appears that the bankrupt fully disclosed the extent of his assets, the creditors will not later be heard to say that the bankrupt was guilty of fraudulent representations.¹³

Participation of the creditor in a secret preference whereby he has received a greater percentage than others, will, of course, estop him.¹⁴

9. In *re Eisenberg*, 16 A. B. R. 776, 148 Fed. 325 (D. C. N. Y.); In *re Jersey Island Packing Co.*, 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.); In *re Ennis & Stoppani*, 25 A. B. R. 383, 183 Fed. 859 (D. C. N. Y.).

10. In *re Roukous*, 12 A. B. R. 169, 128 Fed. 645 (D. C. R. I.).

11. In *re Roukous*, 12 A. B. R. 128, 128 Fed. 645 (D. C. R. I.).

12. Instance In *re Kaplan*, 29 A. B. R. 54 (Sp. M. Pa.); In *re Ballance*, 30 A. B. R. 689, 206 Fed. 505 (D. C. N. Y.).

13. *Walker-Cooley Furniture Co. v. Union Furniture Co.*, 31 A. B. R. 73, 206 Fed. 217 (D. C. Ga.).

14. Impliedly, In *re Sacharoff & Kleiner*, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

§ 2403. **Burden of Proof on Creditor.**—The burden of proof is on the party seeking to have the order of confirmation set aside.¹⁵

§ 2404. **Only "Parties in Interest" Competent to Petition for Setting Aside.**—Only parties in interest may ask for the setting aside of the confirmation.¹⁶

Thus, it has been held that a creditor, who, by an assignment induced by the alleged false representations of the trustee and of the bankrupt, has parted with all title to his claim against the estate, cannot assail a composition nor move to vacate its confirmation.¹⁷

§ 2405. **Principles and Practice on Revocation of Discharge, Whether Applicable.**—Many of the principles laid down upon the subject of the revocation of discharges are applicable and reference is made thereto.¹⁸ But there are some distinctions of importance to be noted.

Thus, it is not necessary to prove the existence of original bars to discharge in order to procure the revocation of the confirmation. But it is necessary in order to obtain the setting aside of a composition, as likewise the revocation of a discharge, that the original order confirming the composition shall be proved to have been procured by fraud.

DIVISION 2.

PLEADING IN SETTING ASIDE COMPOSITIONS.

§ 2406. **Petition to Set Aside Composition.**—The setting aside of the confirmation of a composition is to be effected on petition.

The petition should be verified. It may be verified in the usual form for a bill in equity.¹⁹

But verification by an agent who had not personal knowledge of the facts is insufficient,²⁰ and it has been held that a demurrer would lie.²¹

§ 2407. **Leave to File Petition Granted unless Lack of Merit Appears on Face.**—Leave to file a petition to vacate an order confirming a composition should be given unless, upon the facts alleged, the petition could not, under any circumstances, be granted.²²

15. *Bank v. Doolittle*, 5 A. B. R. 743, 107 Fed. 236 (C. C. A. Tex.).

16. Bankr. Act, § 13. In *re Wrisley Co.*, 13 A. B. R. 193, 133 Fed. 388 (C. C. A. Ills.).

17. In *re Wrisley Co.*, 13 A. B. R. 193, 133 Fed. 388 (C. C. A. Ills.).

18. Compare, analogously, *Bank v. Doolittle*, 5 A. B. R. 731, 107 Fed. 236 (C. C. A. Tex.). See post, § 2806, et seq.

19. In *re Roukous*, 12 A. B. R. 128, 128 Fed. 645 (D. C. R. I.).

It was held by one of the District

Judges for the Southern District of New York that a petition to set aside an order of confirmation in order to permit an unscheduled creditor to proceed against the bankrupt should be presented to the judge who made the original order. In *re Ennis & Stoppani*, 25 A. B. R. 383, 183 Fed. 859 (D. C. N. Y.).

20. In *re Roukous*, 12 A. B. R. 128, 128 Fed. 645 (D. C. R. I.).

21. In *re Roukous*, 12 A. B. R. 128, 128 Fed. 645 (D. C. R. I.).

22. In *re Wrisley Co.*, 13 A. B. R. 193, 133 Fed. 388 (C. C. A. Ills.).

§ 2408. **Reference to Special Master.**—The petition to set aside the composition may be referred to a special master.²³

§ 2409. **No Jury Trial.**—The proceedings are equitable in their nature and the parties are not entitled to a jury trial.²⁴

§ 2410. **Consideration Need Not Be Tendered Back.**—It is not necessary to aver restoration or offer of restoration of consideration received by the creditor, nor to tender the same into court. The consideration need not be restored.²⁵

§ 2411. **Ignorance of Fraud Sufficiently Alleged in General Terms.**—It is sufficient to allege the petitioner did not know of the facts constituting the fraud charged in the procuring of the confirmation, prior to the confirmation. When or how the facts were learned need not be alleged.²⁶

DIVISION 3.

APPEALS OF COMPOSITION MATTERS.

§ 2412. **Appeals of Composition Matters.**—The subject of appeals and reviews of composition matters is treated under the general topic of appeals and reviews.¹

²³. Instance, *In re Kaplan*, 29 A. B. R. 54 (Sp. M. Pa.).

²⁴. *In re Kaplan*, 29 A. B. R. 54 (Sp. M. Pa.).

²⁵. *In re Roukous*, 12 A. B. R. 128, 128 Fed. 645 (D. C. R. I.).

²⁶. *In re Roukous*, 12 A. B. R. 128, 128 Fed. 645 (D. C. R. I.).

¹. See post, § 2838, § 2865½, et seq., and § 2896, general subject of "Appeal, Review and Error."

PART X.

DISCHARGE.

CHAPTER L.

NATURE AND HISTORY OF DISCHARGE.

Synopsis of Chapter.

§ 2414. Discharge.

§ 2415. Discharge a Distinct Incident, Not an Essential, of Bankruptcy.

§ 2416. May "Go into" or Be "Thrown into" Bankruptcy Repeatedly, Irrespective of Refusal or Granting of Discharge.

§ 2416½. Discharge Whether Dependent on Adjudication of Bankruptcy.

§ 2414. **Discharge.**—Discharge is the release of a bankrupt from the obligation to pay his debts which are provable in bankruptcy, except such as are excepted by the act.¹

§ 2415. **Discharge a Distinct Incident, Not an Essential, of Bankruptcy.**—In the orderly development of the treatise the interesting and important subject is now reached of the bankrupt's discharge from future enforcement of liability for his debts incurred before bankruptcy. The proper place for this subject in a systematic treatise is at the end, as here, yet it is so not because the discharge is the end or winding up of a bankruptcy case, but rather because discharge is not involved in the orderly progress of the administration of a bankrupt estate at all and is, rather, merely an incident²—although a most important one—to a bankruptcy case, thus making consideration of it in its chronological order somewhat of an interruption of the systematic treatment of a bankruptcy proceedings.

In *re Clisdell*, 4 A. B. R. 95, 101 Fed. 246 (D. C. N. Y.): "Here then, is a bankrupt duly adjudicated. His petition for a discharge is a separate and distinct proceeding."

Inferentially, In *re Glass*, 9 A. B. R. 397, 119 Fed. 509 (D. C. Tenn.): "While the petition for discharge is founded on the original petition in bankruptcy, voluntary or involuntary, and the record built upon that foundation, it is, after all, quite an independent proceeding, as are the specifications in answer to it."

In *re Walrath*, 24 A. B. R. 541, 175 Fed. 243 (D. C. N. Y.): "But the validity of these proceedings [adjudication of bankruptcy] cannot be challenged here collaterally. The petitioner has been adjudicated and jurisdiction established. That judgment stands unimpeached. This is an independent proceeding."

Thus, the petition for discharge may be filed at any time within the statutory period, regardless of the stage of progress reached in the administration of the estate.³

It has been noted already that bankruptcy law was originally a cred-

1. Bankr. Act, § 1 (12). U. S. ex rel. *Adler v. Hammond*, 4 A. B. R. 739, 104 Fed. 862 (C. C. A. Tenn.).

Fed. 479 (D. C. Ala.), quoted at § 2430¼. Also see Introduction.

3. *Paxton v. Scott*, 10 A. B. R. 80, 92 N. W. (Neb.) 611.

2. In *re Taylor*, 26 A. B. R. 143, 188

itors' law—a swift, sharp remedy placed in the hands of creditors for seizing upon the property and person of absconding or hiding debtors, for ferreting out concealed assets, for reducing them to money and for distributing them equitably amongst creditors. There was originally no thought of affording any relief therein to the debtor himself by freeing him from further molestation for his old debts.⁴

In *re Neely*, 12 A. B. R. 410 (Ref. N. Y.): "It was not originally a feature of bankruptcy legislation either in this country or in England. The fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property equally among his creditors. Originally this was its only purpose, and it was confined to traders as a purely commercial regulation. Latterly a second element was added in the provisions for discharge upon such terms and conditions as the act may provide."

And perhaps it is not an absolutely essential idea, or part, of bankruptcy law, but merely an incident to it.⁵

In *re Levenstein*, 24 A. B. R. 922, 180 Fed. 957 (D. C. Conn.): "Neither this law nor any of its predecessors was passed by Congress for the particular purpose of enabling the debtor to cancel his debts. The primary purpose of all such laws is to distribute the assets of the bankrupt equally and fairly amongst his creditors, and as an incident thereto the present law provides that he may, if his dealings have been fair and honest, be discharged from the balance of his indebtedness as an incentive to further honest effort to obtain a livelihood."

In *re Salmon*, 16 A. B. R. 134, 143 Fed. 395 (D. C. Mo.): "Again, to render a State insolvency law inoperative because in contravention of the Federal Bankrupt Act, it is not essential that the State act shall contain a provision for the discharge of the debtor. It is rather thought such provision for discharge is an incident to, but not an essential part of, such law."

Indeed, bankruptcy was a felony, being expressly declared such by the statute of King James I, and the bankrupt could be thankful if his adjudication as bankrupt did not result in his being imprisoned as a felon.

But as a clearer appreciation arose of the vast change that was taking place in the commercial world; that men were beginning to do business for the general market, no longer waiting for specific orders, and that, as a consequence business was coming more to be done on credit, and that it was becoming more necessary for producers and merchants alike to take chances in disposing of their goods upon the general market, a modified feeling arose with regard to those who failed in business. It began to be understood that a merchant, obtaining goods on credit and taking risk in disposing of them upon the general market, might miscalculate, or might be improvident and might fail, leaving a great body of creditors unpaid, and

4. See ante, Introduction. Also, for expressions of the courts as to the purpose and object of the law, compare, § 17.

5. See ante, Introduction. Also, compare, § 17. In *re Walrath*, 24 A. B. R. 541, 175 Fed. 243 (D. C. N. Y.).

yet might not be a criminal nor be of fraudulent mind. It was precisely this change in the manner of doing business that, as we have seen,⁶ made inadequate the old common-law remedies of attachment and execution and brought about the enactment of the first Bankruptcy Act. But at first, as the provisions of the statutes would seem to indicate, the real import and extent of the change do not seem to have been apprehended. Finally, however, a more just and sensible understanding of the actual situation came about; and the idea developed that if a debtor who had thus taken chances and failed, nevertheless did all he could, thereupon, to aid his creditors in discovering assets and in realizing the most out of them, he should be granted a discharge from the unpaid and unsatisfied remainder; the idea being three-fold: That it was just and humane to the debtor himself, that it aided creditors in discovering and recovering assets, and that it was in the interest of a sound public policy not to keep the debtor forever in bondage to his debts, but to restore his energies to the business community.

This idea of a discharge first became implanted in bankruptcy jurisprudence in the reign of Queen Anne, about one hundred and sixty years after the first bankruptcy law was enacted. The first provision for discharge will be found quoted in the Introduction at § (i).

Thus, in the beginning the privilege of discharge was granted very sparingly and was left much to the discretion of the court.

Hardie v. Dry Goods Co., 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex.): "It is said that the discharge of a bankrupt under the present bankruptcy law is an act of grace, merely incidental to the general purpose, and in fact could be refused entirely; and it is argued from this that the provisions of the law relating to the discharge of bankrupts should be construed against the bankrupt, and all implications and doubts should be resolved against him. Since the days of Queen Anne (4 & 5 Anne, c. 17, § 19) the discharge of the *prima facie* honest bankrupt and his future estate and effects has been provided for in every bankruptcy law; at first with many restrictions, even requiring the consent of creditors."

The first United States Bankruptcy Act that provided unqualifiedly for the discharge of the debtor was that of 1841.⁷

From the foregoing observations it is apparent that the provisions as to discharge have steadily grown in liberality. The law of 1898, before its amendment at any rate, went furthest of any law in the direction of liberality. Only proof, and strict proof, of the violation of some one of the three cardinal virtues of an insolvent debtor was sufficient to bar his discharge, that is to say, the debtor must not, whilst a bankrupt, have made a *false oath* in the proceedings, nor, whilst a bankrupt, have *concealed assets*, nor have *destroyed, concealed or failed to keep books of account*. Yet, if he violated none of these three primary duties, his discharge was assured. Moreover, as if desirous of further qualifying even these merely necessary bars to discharge, the law compelled proof—at least, as to two of them,

6. See ante, Introduction, § (f).

7. In re Schawninger, 16 A. B. R. 429, 144 Fed. 555 (D. C. Wis.).

the false oath and the concealment of assets—to be made almost beyond a reasonable doubt, more than a mere preponderance of the evidence being required—the evidence having to be “convincing” and “satisfying,” since the proof, although in a civil proceedings, must nevertheless be the proof of a crime in each case. By the amendment of 1903 further grounds of discharge were added, so that the extreme liberality of the original enactment of 1898 was considerably restricted. Nevertheless, the friendly attitude of bankruptcy law of today towards discharge is aptly pointed in the significant provision which has persisted in the statute, that the discharge, unless it is proved to be barred, “shall” be granted.

And as the business world is now conditioned, the debtor's discharge is most important to a complete and symmetrical system of caring for the rights of all parties in a business failure—creditors, debtor and the general public.

Hardie v. Dry Goods Co., 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex.): “Originally, in bankrupt laws, the discharge of the bankrupt may have been incidental, and the main purpose the equal distribution of his goods among creditors; but to say it now, and of the present law, we must shut our eyes to the actual practice in our courts. In nearly all and every voluntary bankruptcy brought under the present law the administration or distribution of the bankrupt's property has been practically concluded before filing petition, and the sole object of the petitioner is to be relieved of his debts, and in number the voluntary cases are about four to one of the involuntary. [See Report, Dept. of Justice, 1907.] And the same may be said of the voluntary cases under the Act of * * * 1867, * * * which was passed mainly to relieve the unfortunate debtors ruined by and through the vicissitudes of the great Civil War. For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency; and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and his restoration to business activity, in the interest of his family and the general public, are the main, if not the most important, objects of the law.”

§ 2416. May “Go Into” or Be “Thrown Into” Bankruptcy Repeatedly, Irrespective of Refusal or Granting of Discharge.—The creditors, and likewise the debtor as well, are entitled to invoke the bankruptcy law and to file petitions for adjudication of bankruptcy as often as they deem proper, irrespective of any granting or refusing of discharge to the debtor. The petition for adjudication is nowise dependent upon the petition for discharge. The discharge is a privilege which the debtor may or may not apply for and may or may not obtain, but the adjudication of bankruptcy and the consequences flowing therefrom in the way of avoidance of preferences and legal liens, and the use of the special machinery of the bankruptcy courts, is an entirely different and independent right.⁸

⁸. Compare, *In re Bartoris Estate*, 16 A. B. R. 576, 144 Fed. 540 (D. C. Ark.). Impliedly, *In re Smith*, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.);

impliedly, *In re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.); compare, post, §§ 2437, 2441, 2579.

But of course the right of creditors to bring successive petitions for adjudication undoubtedly is subject to the equity rules granting relief against the vexatious repetition of lawsuits.

§ 2416½. **Discharge Whether Dependent on Adjudication of Bankruptcy.**—Discharge from debts, (except in cases of compositions without adjudication) is founded upon and presupposes prior adjudication of bankruptcy.⁹

In re Clisdell, 4 A. B. R. 95, 101 Fed. 246 (D. C. N. Y.): "The petition for discharge rests upon the fundamental proposition that the petitioner has been adjudicated a bankrupt."

9. In re Walrath, 24 A. B. R. 541, 175 Fed. 243 (D. C. N. Y.).

CHAPTER LII.

PETITION FOR DISCHARGE.

Synopsis of Chapter.

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- § 2446. Staying Discharge to Permit Creditor to Perfect Rights against Surety or Exempt Property.

§ 2417. **Petition for Discharge.**—The first step in invoking the action of the court toward the discharge of debts is the filing by the bankrupt of his petition for discharge.¹

DIVISION 1.

WHO MAY APPLY FOR DISCHARGE.

§ 2418. **Any Person Adjudged Bankrupt, Competent to Apply for Discharge.**—Any person adjudged bankrupt is entitled to apply for discharge.²

§ 2419. **Corporations Entitled to Discharge.**—Thus, corporations are entitled to apply for discharge.³

§ 2420. **Intervening Insanity Does Not Affect Right to Discharge.**—Thus, the intervening insanity of the bankrupt does not affect the right to discharge.

In *re Miller*, 13 A. B. R. 345, 133 Fed. 1017 (D. C. Pa.): "By § 29 of the Act of 1867, the bankrupt was obliged to take a specified oath before he could be discharged, and for this reason his death or insanity before doing what he was thus bound to do personally prevented the discharge. * * * No oath is required upon the part of the bankrupt, and the discharge is of right, unless certain objections thereto are made to appear. These are specified in clause (b) of § 14, as amended by the Act of 1903, and none of them is involved in the present inquiry. Section 8, however, seems to be precisely in point: 'The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be continued and concluded in the same manner, so far as possible, as though he had not died or become insane.' To my mind, this is so plain as not to require construction. 'So far as possible,' the proceedings are to go on and be concluded as if the bankrupt had not died or become insane; and this can only mean, that the statute is not unmindful of the fact that his death or insanity must of necessity interfere to some extent with the ordinary method of procedure. In either event he can not be examined by the creditors, he can not himself prepare

1. Papers should be filed with the district clerk, not with the judge directly. In *re Sykes*, 6 A. B. R. 264, 106 Fed. 669 (D. C. Tenn.).

Various local rules considered. In *re Sykes*, 6 A. B. R. 264, 106 Fed. 669 (D. C. Tenn.).

2. Bankr. Act, § 14 (a).

3. In *re Marshall Paper Co.*, 4 A. B. R. 468, 102 Fed. 872 ((C. C. A. Mass.); *Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.).

No Discharge of Corporation under Act of 1867.—*Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.). In *re New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 Nat. Bankr. Reg. 394,

the proper schedules, he can not himself claim his exemptions, or take the necessary steps toward his final discharge; but, in spite of these obvious difficulties—and there are others equally obvious—the proceedings are to go on ‘so far as possible’ as if he were alive or sane. His right to be discharged is therefore not affected, for it is only possible to oppose such discharge successfully by proving one of the acts described in § 14, and such proof may be made whether the bankrupt be sane or insane, living or dead. In this conclusion the text-writers and the decisions agree, so far as I have been able to discover.”

But a guardian ad litem should be appointed.⁴

§ 2421. Neither Does Intervening Death.—Neither does the intervening death of the bankrupt prevent discharge being granted.⁵

§ 2422. No Discharge of Individual in Partnership Bankruptcy unless Individual Adjudication.—There can be no discharge of an individual member in a partnership bankruptcy unless the individual member has been adjudicated bankrupt individually.⁶

DIVISION 2.

TIME FOR FILING PETITION FOR DISCHARGE, FORM AND NOTICE.

§ 2423. Discharge Petition to Be Filed after One Month and before End of Year from Adjudication.—The bankrupt may file his petition for a discharge at any time after the expiration of a month and before the expiration of a year from the adjudication of bankruptcy.⁷

It has been held that under § 14a, which provides that a bankrupt may apply for his discharge “within the next twelve months subsequent to being adjudged a bankrupt,” when read in connection with the provisions of § 31, relating to computation of time, a bankrupt has a year and a day from adjudication in which to apply for his discharge, unless, for unavoidable delay clearly shown, the court extends the time.⁸

§ 2424. Extension of Time Granted.—Longer time, not exceeding six months, may be granted by the judge if the bankrupt was unavoidably prevented from filing it within that time.⁹

4. In re Miller, 13 A. B. R. 345, 133 Fed. 1017 (D. C. Pa.); In re Burka, 5 A. B. R. 843, 107 Fed. 674 (D. C. Tenn.).

5. Obiter, In re Miller, 13 A. B. R. 345, 133 Fed. 1017 (D. C. Pa.); analogously, In re Hicks, 6 A. B. R. 183, 107 Fed. 910 (D. C. Vt.); impliedly, In re Parker, 1 A. B. R. 615 (Ref. Kans.).

6. In re Pincus, 17 A. B. R. 331, 147 Fed. 621 (D. C. N. Y.); In re Hale, 6 A. B. R. 35, 107 Fed. 432 (D. C. N. Car.).

7. Bankr. Act, § 14 (a).

Compare case holding that “the next 12 months” is to be measured, not from

the date of adjudication, but from the expiration of one month after the adjudication, thus giving the bankrupt thirteen months from the date of adjudication in which to apply for his discharge. In re [Otto E.] Walters, 31 A. B. R. 565, 209 Fed. 138 (D. C. Mont.).

“Striking from Files.” See In re Levenstein, 24 A. B. R. 922, 180 Fed. 957 (D. C. Conn.).

8. In re Holmes, 21 A. B. R. 339, 165 Fed. 225 (D. C. Vt.).

9. Bankr. Act, § 14; In re Fahy, 8 A. B. R. 355, 116 Fed. 239 (D. C. Iowa); In re Holmes, 21 A. B. R. 339,

Objections to an order extending the time for filing a petition for discharge should be made promptly; otherwise the objector may be deemed guilty of laches.¹⁰

Creditors who file an answer to the petition for a discharge on the merits will be deemed to have waived any error or irregularity in permitting the filing of such petition within the extended time.¹¹

§ 2425. But to Be Applied for before Expiration of Time.—Such extension should be applied for before the expiration of the additional six months.¹²

In *re Levenstein*, 24 A. B. R. 822, 180 Fed. 957 (D. C. Conn.): "If, as in the case before is, he filed it shortly after the year has expired, and when apprised of his error by the respondent creditors fails to obtain from the judge any extension of the time within which he may file it and after which he may not, he appears to be in even worse plight than if he had never filed his petition at all. This case is specially lacking in equity, because he was told about his error in time. He had several months within which, upon a favorable showing, he might have obtained from the judge an extension of his time for filing. He failed to obtain such extension, and his right to any further day in court was thereby wiped out as with a sponge.

"It would lead to a multitude of evil practices, and place a premium upon laches, if at this late day the respondents in the original petition were compelled to fight again the battle upon which they had entered in 1900. The discharge in this case was properly revoked, and the motion herein discussed is without merit."

§ 2426. And Only Because "Unavoidably Prevented;" and "Nunc Pro Tunc" Orders to Cover Laches Improper.—The bankrupt must have been "unavoidably prevented" from filing the petition in time,¹³ and a nunc pro tunc order will not be granted to cover laches of the bankrupt, and will only be granted where an order actually was made and there was delay in the entry of the order through the fault of the court.¹⁴

165 Fed. 225 (D. C. Vt.); In *re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

No Notice to Creditors of Application for Extension Requisite.—In *re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

10. In *re Casey*, 28 A. B. R. 359, 195 Fed. 322 (D. C. N. Y.).

11. In *re Churchill*, 28 A. B. R. 607, 197 Fed. 111 (D. C. Wis.).

12. In *re Wolff*, 4 A. B. R. 74, 100 Fed. 430 (D. C. Calif.). Compare, analogously, as to filing specifications on opposition, post, § 2454.

13. In *re Holmes*, 21 A. B. R. 339, 165 Fed. 225 (D. C. Vt.); In *re Casey*, 28 A. B. R. 359, 195 Fed. 322 (D. C. N. Y.).

14. In *re Wolff*, 4 A. B. R. 74, 100 Fed. 430 (D. C. Calif.); In *re Ander-*

son, 14 A. B. R. 221, 134 Fed. 319 (D. C. Mont.).

"Nunc Pro Tunc Entries."—Order must actually have been made though not entered. Compare, In *re Wolff*, 4 A. B. R. 74, 100 Fed. 430 (D. C. Calif.): "It is not doubted that, where an order has been actually made, and through inadvertence of the clerk not entered at the proper time, the court may, in furtherance of justice, direct that the entry be made as of the date when it should have been entered; but the court is not vested with authority to make an order nunc pro tunc, except when the delay in making such order has resulted from some act of its own." Citing *Mitchell v. Overman*, 103 U. S. 64, and *Gray v. Brignardello*, 1 Wall. 627: "Where the delay in rendering a judgment or a decree arises

While the granting or refusal of the application is within the discretion of the judge, it is to be exercised in accordance with established principles: it is a judicial discretion and not a discretion of an arbitrary nature. Hence, it has been held the bankrupt must have been "unavoidably prevented" during the whole period in which the application should have been made.¹⁵

In *re Lewin*, 14 A. B. R. 358, 135 Fed. 252 (D. C. Tex.): "No reason is assigned by the bankrupt for failing to seasonably file a petition for discharge, except that 'he deferred doing so until the latter part of the year,' when sickness in his family prevented him from filing the same. To authorize a petition for discharge to be filed after the expiration of a year from the date of the order of adjudication of bankruptcy, it must be made to appear that the bankrupt was unavoidably prevented from filing it within the one year period. It is discretionary with the judge to grant the application, but the discretion to be exercised in determining the question is a judicial one, and not a discretion of an arbitrary nature. If it appear, using the language of the Act of Congress, that the bankrupt was unavoidably prevented from filing his application in due time, he should be permitted to file it within the additional six months allowed by law. But where it is apparent that he could have timely filed it, but failed to do so for reasons wholly inadequate, the application should be denied. In the present case it is evident that the bankrupt could have filed a petition for discharge prior to the time that sickness appeared in his family, and no reason is alleged, nor is one perceived, why it could not have been filed while the family were ill. It does appear from his application that the bankrupt resided in the city of Hillsboro. That being true, his attorneys were easily accessible, and there is naught in the record to show that sickness or other cause prevented them from preparing a petition for his signature and verification during the twelve-months' period."

In *re Harris & Algor*, 15 A. B. R. 705 (D. C. Pa.): "Leave to file an application after the period of twelve months from the date of the adjudication will not be granted unless it be shown that the petitioner was unavoidably prevented during the whole of the period during which the application for discharge should have been made under the provisions of the Act."

In *re Glickman & Pisonoff*, 21 A. B. R. 171, 164 Fed. 209 (D. C. Pa.): "In addition to this it does not appear * * * that the petitioners were unavoidably prevented during the whole of the period in which the application for discharge should have been made. The ground alleged therefor is that on the day on which they signed the petition for discharge they were unable to pay the costs of advertising. The petition could have been filed without any payment what-

from the act of the court—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties—the judgment or the decree may be entered retrospectively as of a time when it should or might have been entered up."

Analogously, compare holding in case of court rule limiting time, In *re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.).

In *re Glasberg*, 28 A. B. R. 826, 197 Fed. 896 (C. C. A. N. Y.).

Instance, facts held not sufficient to show "unavoidably prevented." In *re Daly*, 30 A. B. R. 475, 205 Fed. 1002 (D. C. Wash.).

In *re Chase*, 26 A. B. R. 456, 186 Fed. 408 (D. C. Mass.), wherein the court holds that the fact that an application within the year would have been denied because of a previous discharge within six years in voluntary proceedings, does not amount to an unavoidable prevention.

15. In *re Chase*, 26 A. B. R. 456, 186 Fed. 408 (D. C. Mass.).

ever, and it does not appear from the petition that the bankrupts were unavoidably prevented from paying the costs of advertising on any other than 26th day of October, 1907. Having failed, therefore, to establish the only statutory ground upon which an extension of time can be granted, the recommendation of the referee was fully justified. The petition of the bankrupts is accordingly refused.

On the other hand, the words "unavoidably prevented" have been given a very liberal interpretation.

In re Churchill, 28 A. B. R. 607, 197 Fed. 111 (D. C. Wis.):

"It will be conceded that there is no fixed rule or standard whereby it can readily be determined whether a person was 'unavoidably prevented' from doing a certain act. If a narrow view respecting the meaning of these words be entertained, then nothing short of physical obstacles, or other facts or circumstances which literally deprived the bankrupt of his will or power to exercise his right, must be shown to have existed before the demands of the statute are satisfied. However, I think that the terms should be given a broader construction. The fact that the bankrupt is given nearly a year within which to file his application, and that such time can be enlarged six months, indicates that Congress was disposed to be rather liberal. If the terms are narrowly construed as above suggested, a situation would rarely arise in which the bankrupt could satisfy that construction. In other words, it would not happen very frequently, if ever, that a bankrupt would be 'unavoidably prevented' for a period of a full year from preparing and filing the petition for discharge. It seems to me that the act was intended to provide a remedy for situations which were likely to occur—and which would occur, not through the intervention of overruling obstacles as above indicated, but rather through excusable neglect, reasonable grounds for delay, mistake, possibly inadvertence, and the like. That is, it was contemplated that a bankrupt might default, as parties to litigation frequently default, in the performance of an act within a limited time, and that a further time in the discretion of the court be allowed to relieve from the consequences of such default. This seems a more reasonable construction to be given the words in question. While it may be claimed that a delay occasioned through a misunderstanding as is alleged fails not only to show that the bankrupt was "unavoidably prevented," but also fails to show a reasonable excuse, it is equally true that a different view is possible; that if a bankrupt in good faith represents to the court his reliance upon counsel, and counsel appear to have misunderstood their client's instructions, the default is explained in an entirely reasonable manner, and if, upon such explanation, the judge is satisfied, it seems to me he has exercised a discretion which ought not to be disturbed."

§ 2427. No Jurisdiction to Discharge, on Petition Filed after Eighteen Months.—The bankruptcy court has no jurisdiction to grant a discharge on a petition filed after the expiration of eighteen months from the date of adjudication. A discharge granted on a petition for discharge filed thereafter is null and void.¹⁶

16. In re Knauer, 13 A. B. R. 503, 133 Fed. 805 (D. C. Iowa); In re Wagner, 15 A. B. R. 101, 139 Fed. 87 (D. C. Nev.); In re Von Borries, 21 A. B. R. 849, 168 Fed. 718 (D. C. Wis.); In re Loughran, 32 A. B. R. 330, 215 Fed. 271 (D. C. Pa.); Bacon v. Buffalo Cold Storage Company, 27 A. B. R.

736, 193 Fed. 34 (C. C. A. Tex.); In re Richter, 27 A. B. R. 215, 190 Fed. 905 (D. C. Conn.).

Compare case holding, in effect, that court has jurisdiction for 19 months after date of adjudication. In re [Otto E.] Walters, 31 A. B. R. 565, 209 Fed. 132 (D. C. Mont.).

In re Fahy, 8 A. B. R. 354, 116 Fed. 239 (D. C. Iowa): "As I construe the statute, this is a limitation on the jurisdiction of the judge over the matter of discharge. The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and therefore, unless it is petitioned for within the time limit fixed by § 14 of the act, the court of bankruptcy is without the power and jurisdiction to grant a discharge. If the court, yielding to the equitable considerations pressed upon it, should grant a discharge in form to the bankrupt, it would be a mistaken kindness, for the validity of the discharge could be impeached before any court wherein it might be pleaded as a bar to a claim, on the ground of want of jurisdiction in this court to entertain the petition for discharge, the record showing on its face that the petition was not filed within 18 months of the date of the adjudication."

So, where a partnership and its individual members have been adjudged bankrupt, the fact that the firm and some of the partners have been duly discharged will not excuse the failure of another partner to petition for his discharge, as an individual, within the prescribed time.

In re Springer, 29 A. B. R. 96, 199 Fed. 294 (D. C. N. Caro.): "It is strongly insisted by counsel for petitioner that in none of the cases cited was a bankrupt a member of a copartnership, which had been adjudged bankrupt. He insists that the Bankruptcy Act, and numerous decisions cited, recognize the fact that a partnership is a distinct legal entity for the purpose of proceeding in bankruptcy. This is undoubtedly true. That a partnership may commit an act of bankruptcy and upon the petition of its creditors or upon its own petition, be adjudged bankrupt, without proceeding against or joining the partners individually, is made clear enough by § 5 of the act, and numerous decisions of the courts. It is, however, equally clear that, in either involuntary or voluntary proceedings, both the partnership and the individual members thereof may, in the same proceeding, be adjudged bankrupts, and that, upon conformity to the law, the partners may apply for and receive their discharge, both as partners and as individuals. The record of the District Court for the Southern District of New York, duly certified to this court, shows that the petition in that court was filed against, and it was adjudged that 'Horace D. Springer and Thos. J. Mulligan, individually and composing the firm of Springer & Mulligan, are hereby declared and adjudged bankrupt;' that Mulligan filed his petition for a discharge from his debts as a member of the partnership and individually; and that it was granted. Conceding, therefore, that the partnership was a legal entity and, as such, subject to proceedings in bankruptcy, and conceding further that if the first proceeding had been against the partnership alone, not including the individual partners, that the principle of *res judicata* would not apply to petitioner Springer, I think that in the light of the record in the first proceeding, the decisions cited apply to this case, and preclude petitioner from the right to have a discharge from the debts existing and provable against him in the first proceeding. As there are no other debts upon which a discharge can operate, the petition must be denied."

Its validity may be attacked in any court, even collaterally.¹⁷

But if it does not appear to have been filed after the *eighteen* months but only after the *year*, it may not be collaterally impeached, the presumption

17. Obiter, In re Fahy, 8 A. B. R. 354, 116 Fed. 239 (D. C. Iowa).

obtaining that the court had granted leave and granted it on sufficient showing.¹⁸ Thus, it may not be attacked on discharge hearing.¹⁹

§ 2427½. No Vacating of Adjudication of Bankruptcy, to Give Jurisdiction.—Nor may the eighteen months limitation be evaded by re-opening the original adjudication of bankruptcy, as to which no limitation of time exists, and readjudicating the bankrupt, for the purpose of enabling him to file his petition for discharge in time.

In re Morse, 21 A. B. R. 709, 168 Fed. 157 (D. C. N. Y.): "The present motion is not based upon allegations of fraud, mistake, or error of law in the adjudication. The bankrupt admits that he not only allowed (and to a certain extent consciously allowed) the default at the time of the entry of the adjudication, but that he neglected to apply for a discharge within the period specified for that purpose; and, further, it now appears from the record that one of the creditors in the bankruptcy proceeding against the corporation, upon whose notes the present individual bankrupt was indorser, has sued him upon that indorsement, that because of his lack of discharge he could present no defense to the suit, that judgment has been obtained, and that upon supplementary proceedings he is shown to have a salary which may be reached, to a certain extent, under the laws of the state of New York. If the only question involved were that of opening a default, the court would feel disposed to grant the motion, as no one's rights would seem to be materially injured by the change of status since the adjudication. But § 14 of the Bankruptcy Act * * *, after providing that 'after the expiration of one month, and within the next twelve months subsequent' to adjudication, a discharge may be applied for, provides specifically: 'If it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.' Congress has thereby limited the period within which, even in the case of unavoidable necessity, an application for discharge can be granted, and while in the present instance great hardship would seem to be involved, it would be much more dangerous to attempt to restore conditions by opening an adjudication, and thus to get around the entire system of proceedings under the bankruptcy law, than the equities of any particular case would justify."

Nor will the bankrupt be allowed to evade the limitation by filing a new petition in bankruptcy where the debts are identical and there are no new assets.²⁰

§ 2428. Referee Need Not Notify Bankrupt to File Petition for Discharge.—It is no part of the referee's duty to inform the bankrupt of the time the year will expire. And notice actually, though incorrectly, given by the referee will not toll the statute, nor extend the time.²¹

§ 2428½. Nor Issue "Certificate of Conformity."—Nor need the referee issue a "certificate of conformity," as was the practice under the

18. In re Haynes & Sons, 10 A. B. R. 13; 122 Fed. 560 (D. C. Pa.).

19. Compare, In re Walrath, 24 A. B. R. 541, 175 Fed. 243 (D. C. N. Y.), quoted at § 2415.

20. See post, § 2347, and authorities there cited.

21. In re Knauer, 13 A. B. R. 503, 133 Fed. 805 (D. C. Iowa).

old law of 1867. Indeed, such a certificate is wholly unauthorized.²² It is of questionable propriety for the court virtually to descend from the bench and to become an attorney in the case, or to prejudge the case, as would be the logical result of such certifying where creditors have not entered opposition.

Of course, if specifications in opposition to discharge be filed, they may be referred to the referee as special master,²³ who may and should duly report his findings.

§ 2429. Form of Petition for Discharge.—The petition for discharge must state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.²⁴

§ 2430. Whether Petition to Be Verified.—It is doubtful whether the petition for discharge need be verified. The form does not seem to require verification.²⁵

Moreover the petition for discharge is more in the nature of a mere motion than it is of a petition; nothing is to be proved; simply the machinery of the court is to be set in motion to grant the discharge. The discharge "shall" be granted when applied for, unless objecting parties prove the existence of facts sufficient to bar it, the only "petition," if there be any at all, thus being the specifications of the creditors of their grounds of opposition to the discharge.

However, there is force to the contention that the petition for discharge is a pleading, setting up facts, namely, that the bankrupt "has duly surrendered all his property and rights of property," and "has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy," the mere specifications of opposition setting up affirmative defenses and throwing the burden of proof on the objecting creditors, not being different from affirmative defenses in ordinary pleadings.

In *re Glass*, 9 A. B. R. 396, 119 Fed. 509 (D. C. Tenn.): "A petition for discharge avers *inter alia*, that the petitioner has duly surrendered all his property! That is a fact outside the record, known possibly only to himself as to its truth; and so it would seem both by the statute and according to the analogies it should be verified by his oath although this form does not call for it."

In *re Taylor*, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.): "The application should be denied for the additional reason that it is a pleading, required by General Order xxxi to 'state concisely in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bank-

²². In *re Randall*, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.). But compare, In *re Johnson*, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ark.). And see *contra* practice. In *re Levin*, 23 A. B. R. 845, 176 Fed. 177 (C. C. A. Mass.). Also *contra*, *Mahoney v. Ward*,

3 A. B. R. 770, 100 Fed. 278 (D. C. N. Car.).

²³. See § 2626.

²⁴. Gen. Ord. XXXI. Also see Appendix, Official Form No. 57.

²⁵. *Obiter*, In *re Jemison Mercantile Co.*, 7 A. B. R. 588, 112 Fed. 966 (C. C. A. Ala.).

rupt,' and therefore is a pleading setting up matters of fact, which § 18, subdivision 'C' requires to be verified. The case of *In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49, decided by the Circuit Court of Appeals for this circuit, is in point. It is important that the bankrupt should be required to state under oath that he has surrendered all his property to his trustee and has complied with, fully, the act (form 57), as a condition to obtaining his discharge, especially as his discharge follows as a matter of course and without the offer of proof of those facts by him, unless objecting creditors enter appearances and file specifications of objections."

And in one case, the omission of verification from the form was explained as an inadvertence in drafting.

In re Glass, 9 A. B. R. 394, 119 Fed. 509 (D. C. Tenn.): "He pointed to the fact, however, that Forms Nos. 57 and 58 and General Orders 31 and 32 do not prescribe any form of verification, while other forms do append it wherever it is required. But this is only a fortuitous circumstance, I think, and quite indeterminate. These forms naturally are fashioned on those under the act of 1867, which required verification only in those matters where it was specifically provided by that act, or where the Supreme Court, exercising its statutory power to make the rules of practice and forms, chose to demand it. I have gone over those forms, and compared them with the forms under the existing act. Generally, each verification appended to the old forms was required in terms by the statute of 1867, though sometimes this was not so, as in Form No. 40, for the removal of an assignee, which prescribes verification without any direction of the statute; while Form No. 52 of the act of 1898 exacts none for the removal of a trustee. The precept for verification does not appear to have been uniformly guided by the statute in either set of these forms. However this may be, the command of the statute of 1898 is imperative that 'all pleadings setting up matters of fact shall be verified by oath.' Section 18c. The omission of the Supreme Court, therefore, to prescribe a verification for a petition for discharge on Form No. 57 of 1898, or for the specifications in opposition thereto on Form No. 58, cannot override this plain command of the statute, if either of them be a 'pleading,' and 'sets up matters of fact.' Under the act of 1867, there being no such requirement, a verification might be, and often was, pretermitted in contracting the forms of 1867. And it is apparent that the draftsman of the new forms of 1898 factitiously followed the forms of 1867 in the omission of a verification without noticing this distinction between the two statutes. Thus he made Forms No. 57 and No. 58 of 1898 conform, in respect of this absence of verification, to Forms No. 51 and No. 53 of 1867. But in the one case the statute permitted the omission, and in the other it does not. Therefore it does not appear that in prescribing these forms the Supreme Court in 1898 has deliberately ruled that the specifications in opposition to a discharge are not 'a pleading,' and do not require a verification, under § 18c."

The absence of a verification in the form is said to be without significance, since the same absence occurs in the form of specifications in opposition to discharge, which are thoroughly established to be pleadings requiring verification.²⁶

In any event, the objection must be timely, else it is waived.²⁷

^{26.} *In re Taylor*, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.); *In re Glass*, 9 A. B. R. 396, 119 Fed. 509 (D. C. Tenn.).

^{27.} *In re Taylor*, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.).

§ 2430 $\frac{1}{4}$. Where to Be Filed.—The petition for discharge is to be filed with the District Clerk, not with the referee.

In *re Taylor*, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.): "Applications for discharge are in the nature of a separate proceeding from the original cause which is closed upon the final distribution of the assets of the estate. Over them, the reference to the referee of the original cause, confers no jurisdiction, since the act itself excepts from the jurisdiction of the referee the matter of hearing and granting discharges. The cases in which the court 'may include the referee' are not inclusive of the matter of discharges. The act requiring the application to be filed in the court, and the court so far as discharges are concerned being exclusive of the referee, a filing with the referee is not a filing with the court, and does not confer on it jurisdiction. The application should be filed with the clerk in order to be filed with the court."

And it is improper to attempt by "local rule" to change in this particular the "uniform law on the subject of bankruptcies throughout the United States" established by the Constitution, for one of the objects of such a law is to bring about uniformity of procedure and to abolish confusion in practice.²⁸

§ 2430 $\frac{1}{2}$. Judge to Fix Date of Hearing.—It is the duty of the judge to fix the date for the hearing of the discharge petition and to order the issuance of notice thereof; and a local rule leaving such duties to the referee is void.²⁹

§ 2431. Ten Days Notice by Mail, Sent.—Upon its filing, either the referee in charge of the estate, or the clerk himself, sends out ten days notice by mail to all creditors of the time and place fixed by the judge for hearing the petition.³⁰ If the referee sends them out, as is usually the case, he does so upon receipt of a certificate of the clerk that the petition has been filed.

The law does not require for the validity of the notices that they be actually received and read by the creditors.³¹

A "certificate of conformity," as required under the law of 1867, is not necessary.³²

²⁸. See instances of improper "local rules" introducing confusion into bankruptcy practice in this regard. In *re Pincus*, 17 A. B. R. 380, 130 Fed. 731 (C. C. A. Ills.).

²⁹. Official Form 57; also, see In *re Johnson*, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ala.).

³⁰. Bankr. Act, § 58 (a) (2). See ante, § 365.

Form of Discharge Notice.—The suggested form of such notice to creditors is given in the Appendix as Unofficial Form No. 64.

Where Schedules Give No Addresses.—Where the schedules recite that the addresses of none of the creditors are known and, as a consequence,

no notices are sent by mail, there should be a showing made to the court that due diligence has been exercised to ascertain the addresses, else the court should not hear the discharge petition. In *re Dvorak*, 6 A. B. R. 66, 107 Fed. 76 (D. C. Iowa). The court in this case said no jurisdiction was obtained.

The failure to give such notice is, in some jurisdictions, sufficient ground for the dismissal of the petition for discharge. In *re Wollowitz*, 27 A. B. R. 558, 192 Fed. 105 (C. C. A. N. Y.), construing a rule of the Southern District of New York.

³¹. In *re Downing*, 28 A. B. R. 778, 199 Fed. 329 (D. C. N. Y.).

³². See § 2428 $\frac{1}{2}$.

§ 2431½. Amendment of 1910—Thirty Days Notice Required.—The Amendment of 1910 to Bankruptcy Act § 58 (a) (9) provides that there shall be 30 days notice of all applications for the discharge of bankrupts. The change from ten days notice to thirty days notice was necessitated by the Amendment of 1910 to § 14b, whereby the trustee was made a competent party to oppose the discharge when authorized so to do at a meeting of creditors, such meeting of creditors itself requiring ten days notice in accordance with the time specified in § 58.

See Report No. 691 of the Senate Judiciary Committee of the Sixty-First Congress, Second Session: 'This section is entirely new, not being in the House bill in any form. It is thought to be necessary by virtue of the amendment of § 14 making the trustee a competent party to oppose the discharge of the bankrupt when authorized by creditors at a meeting called for that purpose. As previously remarked in regard to amendatory § 6, the fact that the ten days notice for the entry of appearance in opposition to such application for discharge is likely to bring appearance day on the same day with the meeting of creditors called to authorize the trustee to enter appearance in opposition to discharge (which must also be upon ten days' notice), necessitates the providing of some way in which this meeting of creditors can be held before that appearance day. Your committee has thought such object best accomplished by providing for thirty days' instead of ten days notice of applications for discharge, thus bringing the day for entry of appearance in opposition to discharge much later than the day for the meeting of creditors to consider whether or not opposition should be entered by the trustee. No harm is done to the bankrupt by the delay, for he is protected until the matter of discharge is finally disposed of.'

§ 2432. Notice Also by Publication.—The statute does not expressly provide that notice by publication of the discharge is to be given; but the fact that the Supreme Court's Form No. 57 provides for an order directing publication of notice, might indicate that such publication ought always to be given.

Inferentially and obiter, *Nat'l Bk. v. Moyses*, 186 U. S. 181, 8 A. B. R. 10: "Form No. 57 gives the form of petition for discharge and the order for hearing to be entered thereon, requiring notice to be published in a designated newspaper in the district, and 'that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.'"

And such notice by publication would seem to be absolutely requisite to effect the discharge of the claims of creditors whose names or addresses are unknown.

DIVISION 3.

DISMISSAL OF PETITION FOR DISCHARGE; SECOND PETITION FOR DISCHARGE:
AND RES ADJUDICATA.

§ 2433. Dismissal of Petition for Want of Prosecution or by Bankrupt.—A petition for discharge may be dismissed for want of pros-

ecution;³³ or by the bankrupt.

§ 2434. No Dismissal for Failure to Bring on Hearing in Opposition.—Dismissal of the bankrupt's petition for discharge for want of prosecution for mere dilatoriness in bringing it on for hearing upon specifications of objections thereto, is improper, where the bankrupt's petition itself was filed in due time.³⁴

§ 2435. No Dismissal by Bankrupt after Hearing of Specifications in Opposition.—A bankrupt has no absolute right to dismiss his petition for discharge after hearing has been had upon specifications in opposition thereto and the opposing creditors have established their right to an order denying discharge.³⁵

§ 2436. Dismissal of Petition for Discharge or Failure to File It, in Effect a Judgment Denying Discharge.—The dismissal of the petition for discharge for want of prosecution, and also the failure to file a petition for discharge, are in substance and effect judgments denying discharge.³⁶

Kuntz v. Young, 12 A. B. R. 505, 131 Fed. 719 (C. C. A. Minn.): "The failure of the bankrupt to apply for a discharge from his debts in the involuntary proceeding within twelve months after the adjudication foreclosed his right to such a discharge. It is only within that time that he may, under the bankruptcy law, make a lawful application to be relieved from his debts. The record of his failure to make the application in that proceeding was, in effect, a judgment by default in favor of his creditors to the effect that he was not entitled to a discharge from their claims. A judgment by default renders the issue as conclusively *res adjudicata* as a judgment upon a trial. The result is that the question whether or not the bankrupt was entitled to be discharged from the claims of the creditors scheduled and provable in the involuntary proceeding was conclusively determined in an action between them and the bankrupt by the record of his failure to apply for a discharge in that proceeding. But the parties to the voluntary were the same as to the involuntary proceeding, for *Kuntz* scheduled the same claims and creditors, and the trustee, who objected to his discharge, was the legal representative of the latter. The bankrupt's application for a discharge in the voluntary proceeding presented the same issue which had been conclusively determined against him in the invol-

33. In *re Lederer*, 10 A. B. R. 492, 125 Fed. 96 (D. C. N. Y.). Instance, *Lindeke v. Converse*, 28 A. B. R. 596, 198 Fed. 618 (C. C. A. Minn.); compare dismissal because the ten days notice was not sent, In *re Wollowitz*, 27 A. B. R. 558, 192 Fed. 105 (C. C. A. N. Y.).

34. In *re Wolff*, 13 A. B. R. 95, 132 Fed. 396 (D. C. Calif.); In *re Glasberg*, 28 A. B. R. 826, 197 Fed. 896 (C. C. A. N. Y.).

35. In *re Henschel*, 12 A. B. R. 31 (Special Master, N. Y.).

36. In *re Weintraub*, 13 A. B. R. 711, 133 Fed. 1000 (D. C. Mass.); In *re*

Wolff, 13 A. B. R. 95, 132 Fed. 396 (D. C. Calif.); In *re Semons*, 15 A. B. R. 822 (C. C. A. N. Y.); In *re Kuffler*, 11 A. B. R. 469, 127 Fed. 125 (C. C. A. N. Y.); In *re Bramlett*, 20 A. B. R. 402, 161 Fed. 588 (D. C. Ga.); In *re Silverman*, 19 A. B. R. 460, 157 Fed. 675 (C. C. A. N. Y.); In *re Elby*, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa); In *re Von Borries*, 21 A. B. R. 849, 168 Fed. 718 (D. C. Wis.); In *re Schnabel*, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.); In *re Stone*, 23 A. B. R. 24, 172 Fed. 947 (D. C. Ore.); *Pollet v. Cosel*, 24 A. B. R. 678, 179 Fed. 488 (C. C. A. Mass.).

untary proceeding, and there was no error in the refusal of the court below to reverse the former judgment and grant the application.

"The denial of an application for a discharge from debts provable in proceedings under one petition in bankruptcy under the Act of 1898 renders the issue of a right to a discharge from those debts in a proceeding under a subsequent petition *res adjudicata*. A failure to apply for a discharge within twelve months after adjudication in the earlier proceeding has the same effect. *Gilbert v. Hebard*, 8 Metc. 129; *In re Drisko*, Fed. Cas. No. 4,090; *In re Herrman* (D. C.), 4 Am. B. R. 139, 102 Fed. 753, 754, 106 Fed. 987, 988."

In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa): "The failure of the bankrupt to apply for a discharge in the first bankruptcy proceedings, and the approval of the record of such proceedings by the court without granting a discharge, are in effect a judgment by default in favor of his then existing creditors that the bankrupt was not entitled to a discharge from their claims, and that judgment is conclusive in favor of such creditors."

In re Pullian, 22 A. B. R. 513, 171 Fed. 595 (D. C. Tenn.): "It is now well settled in the later federal decisions, overruling in some respects the case of *In re Claff* (D. C.) 7 Am. B. R. 128, 111 Fed. 506, and the cases therein cited, that where, in a bankruptcy proceeding, the bankrupt fails to apply for a discharge within the time limited by the Bankruptcy Act, this has the same effect as a judgment denying his discharge from the debts therein involved, and that in a subsequent bankruptcy proceeding, in which no new assets are being administered, either an actual judgment denying his discharge in the former case, or a constructive judgment by default for failure to make application, will operate as *res adjudicata* against him and prevent his discharge from the same debts in the new proceeding."

In re Schnabel, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.): "While the application of the rule in the present instance is severe, it seems to be impossible to distinguish between a bankrupt who fears to apply for a discharge and one who neglects to do so."

And that the failure came from the neglect of counsel and not from that of the bankrupt, will not obviate the rule.³⁷ But the order must be entered, in order to be *res adjudicata*.³⁸

§ 2437. Second Petition Not Maintainable after Refusal of First, Where Debts Identical.—A second petition for discharge may not be maintained in the same proceedings, nor in new proceedings where the debts are identical, after the first petition has been denied, or not filed at all. The first denial is *res adjudicata* and binding on both parties, and a second petition is vexatious and useless repetition.³⁹

³⁷. *In re Stone*, 23 A. B. R. 24, 172 Fed. 947 (D. C. Ore.).

³⁸. *In re Elkind & Schwartz*, 23 A. B. R. 166, 175 Fed. 64 (C. C. A. N. Y.).

³⁹. *A fortiori*, *Kuntz v. Young*, 12 A. B. R. 505, 131 Fed. 719 (C. C. A. Minn.), quoted at § 2436; *In re Bramlett*, 20 A. B. R. 402, 161 Fed. 588 (D. C. Ga.); *In re Schnabel*, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.). Contra, if in entirely new proceedings, *In re Claff*, 7 A. B. R. 128, 111 Fed. 506 (D. C. Mass.).

Discharge Refused without Preju-

dice to Renewal of Application if Pending Litigation Favorable to Bankrupts.—For a peculiar case, not to be taken as a precedent, see *In re Olansky*, 20 A. B. R. 780, 163 Fed. 428 (D. C. N. Y.), where a discharge was refused for concealment of assets without prejudice to a renewal of the application for discharge within the 18 months, if pending litigation for the recovery of assets should result favorably to the bankrupts!

Bacon v. Buffalo, etc., Co., 27 A. B. R. 736, 193 Fed. 34 (C. C. A. Tex.);

In re Weintraub, 13 A. B. R. 711, 133 Fed. 1000 (D. C. N. J.): "On June 20, 1899, Louis Weintraub, Benjamin Lewis and Samuel Golden, partners trading as Weintraub, Golden & Lewis, were adjudged bankrupts in an involuntary proceeding instituted in the United States District Court for the Southern District of New York. They did not apply for an order of discharge within the time limited by the Bankruptcy Act. On December 30, 1903, they filed their voluntary petition in bankruptcy in this court, setting forth, as their affidavits admit in the schedules annexed to their petition, the same debts that appear in the New York proceeding. The object of the suit in this court is to secure a discharge from the same debts from which the bankrupts failed to secure a discharge in the New York court. The proceeding in the New York court, furthermore, has not been terminated. On March 14, 1904, the above facts having been presented to the late Judge Kirkpatrick, of this court, he made an order staying and enjoining the bankrupts from taking any further proceedings upon their voluntary petition in this court pending the determination of the proceedings in the New York court. The counsel for the bankrupts now applies for an order vacating the above mentioned order of March 14, 1904.

"The application must be denied. It is a settled rule of law that, where a bankrupt has failed to apply for his order of discharge within the time limited by the statute, his right to such order is *res judicata*, and he cannot by any subsequent proceedings secure a discharge from the debts provable in the former proceedings. See *Kuntz v. Young*, 12 Am. B. R. 505 (C. C. A.), 131 Fed. 719.

"An order will be signed denying the motion of the bankrupts."

In re Royal, 7 A. B. R. 636, 113 Fed. 146 (D. C. N. Y.): "* * * after his first petition is denied, after investigation of its merits."

A fortiori, In re Feigenbaum, 9 A. B. R. 595, 121 Fed. 69 (C. C. A. N. Y., reversing 7 A. B. R. 339): "The simple question presented by this review is whether a bankrupt, who has been refused a discharge, after full hearing, on the ground that he has fraudulently concealed assets from the trustee, will be permitted, within a few months thereafter, to file a second petition alleging the same facts and prosecute a new application for a discharge?

"It is admitted that the debts and assets in the two petitions are identical except that there is a difference of \$8 in the amount of property claimed as exempt. There is no attempt to disguise the fact that the purpose of the present proceeding is to obtain the discharge which the court refused to grant. The judgment of the court refusing the discharge in the first proceeding remains in full force, no appeal having been taken.

"We do not deem it necessary to decide whether the bankruptcy proceedings should be dismissed in such circumstances, but we are clearly of the opinion that the bankrupt should be restrained from filing and prosecuting a second application for a discharge. Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, in limine, so flagrant an attempt to circumvent its decrees.

"Assuming that this proceeding is allowed to go on, what will be the result? The bankrupt will present a petition for discharge; the creditors will file specifications alleging the same grounds of opposition, the issue thus joined will be referred in due course and the referee and the judge will thereafter be

In re Loughran, 32 A. B. R. 330, 215 Fed. 271 (D. C. Pa.); In re Richter, 27 A. B. R. 215, 190 Fed. 905 (D. C. Conn.); In re Springer, 29 A. B. R. 96, 199 Fed. 294 (D. C. N. C.). Compare ante, § 2427.

called upon to decide the same questions which have already been determined, upon the same proof and between the same parties. It is true that in such circumstances it is probable that the same conclusion will be reached, but why should the creditors be harassed by further proceedings. Why should they be compelled to employ counsel and expend their money in trying again and again a question upon which the bankrupt has had his day in court? If his contention be correct there is nothing to prevent him from filing a third petition if his discharge be again refused and so on *ad infinitum*.

"A proceeding in bankruptcy is in the nature of a bill in equity in which the bankrupt is complainant and the creditors are defendants.

"Where a discharge is refused on the merits the judgment inures to the benefit of all the creditors. Both parties are bound by it and neither party should be permitted to try the same question again; it is *res judicata*.

"We have proceeded upon the assumption that in the present proceeding the creditors can avail themselves of the same objections interposed in the former proceedings and sustained there. If for technical reasons or otherwise they are prevented from doing this the iniquity of this attempt to procure a discharge is still more apparent. It is the contention of the bankrupt's counsel that this is an entirely new and distinct proceeding and in this view he is undoubtedly correct.

"Can the misconduct of the bankrupt in the former proceeding be imported into this proceeding? Suppose the creditors should again interpose the objection that the bankrupt has 'Knowingly and fraudulently concealed while a bankrupt * * * from his trustee property belonging to his estate,' can they prove the allegation by showing that he has been guilty of this misconduct in some former bankruptcy? Does not the statute refer to the pending proceeding and the trustee then in *esse*? If so, it will be at once apparent that the creditors may, in many instances, be remediless and the second petition may be used to consummate the most glaring frauds.

"The same observations are true regarding the failure to keep books, etc. This must be done with intent to conceal the bankrupt's true financial condition and in contemplation of bankruptcy. What bankruptcy? The present or some previous bankruptcy?

"Other considerations of a similar nature might be suggested as showing the questions which may arise if this unjustifiable proceeding be permitted to continue. They are advanced tentatively and without intending to express any opinion as to whether they are tenable or not, our sole purpose being to demonstrate the proposition that the creditors having succeeded upon the question of the discharge ought not to be called upon to face a situation where they may be defeated on technicalities by a clever manoeuvre of the bankrupt.

"All the facts constituting the estoppel are before the court; they cannot be changed by any subsequent proceedings. The bankrupt is not entitled to prosecute proceedings for a discharge, the debts and assets being the same as in the former case, and, therefore, he should not be permitted to begin such proceedings.

"We are of the opinion that the stay, in so far as it restrained the bankrupt from filing a petition for a discharge should have been continued, and to this extent the order of the District Court is reversed, with instructions to proceed in accordance with this opinion.

"All concur."

In *re Pullian*, 22 A. B. R. 513, 171 Fed. 595 (D. C. Tenn.): "Further, that where the second proceeding is under a voluntary petition filed by the bankrupt, in which he brings into court no material assets for administration, and

the sole purpose is to obtain a discharge from the debts involved in the former proceeding, no ground of relief is presented, and the proceedings should be dismissed as futile. 2 Remington on Bankruptcy, § 2437, p. 1471; * * * *Kuntz v. Young*, supra. Or, at least, that further proceedings in the case should be stayed (*In re Weintraub*, supra), or the bankrupt restrained and enjoined from filing a petition for discharge in the second case (*In re Feigenbaum*, supra)."

It has been held that the entire subsequent bankruptcy proceedings may be thus dismissed, and the dismissal need not be merely of the petition for discharge.⁴⁰

In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa): "When, therefore, it is made to appear to the court that a bankrupt under the Act of 1898, who has failed to apply for a discharge within the time prescribed by that act, or has been denied a discharge by the court, files a subsequent petition to be discharged from the same debts owing by him at the time of filing the prior petition, and schedules no assets, the proceeding should be dismissed, because by the prior proceedings it is conclusively determined that he is not entitled to a discharge from those debts. * * * There are no assets, and, so far as appears from the record, further proceedings in the matter would only be to determine the right of the bankrupt to a discharge, and he presents with an answer to the petition of the creditors, a petition for discharge which he asks leave to file. Should he be permitted to do this, the creditors may interpose in opposition thereto the prior proceedings as a conclusive adjudication in their favor that he is not entitled to the same. This would entail additional and unnecessary expense upon both the bankrupt and the creditors, which may and should be avoided."

But this could not be the true rule where there are assets to be administered, for the right of dismissal in these cases is based on *res judicata*, which depends, in its turn, of course, upon identity not only of the parties and questions but also of the subject involved. Identity of debts is sufficient to warrant the dismissal of a second petition for discharge after refusal of the first, but if there are assets, there are certainly subjects for administration in bankruptcy and consequently reason for not dismissing the entire proceedings.⁴¹

The fact that the creditors appeared in the second bankruptcy, proved their claims and examined the bankrupt will not estop them from opposing the discharge on this ground.⁴²

In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa): "The fact that the creditors may have proved their claims before the referee in this proceeding and examined the bankrupt and others at their first meeting, does not estop

⁴⁰. *Kuntz v. Young*, 12 A. B. R. 505, 131 Fed. 719 (C. C. A. Minn.).

⁴¹. Compare, *In re Feigenbaum*, 9 A. B. R. 595, 121 Fed. 69 (C. C. A. N. Y.). Compare, *In re Kuffler*, 18 A. B. R. 17, 151 Fed. 12 (C. C. A. N. Y., reversing 16 A. B. R. 305). Compare, ante, § 2416.

Compare, also, *In re Kuffler*, 19 A.

B. R. 181, 153 Fed. 667 (D. C. N. Y.). the syllabus in the case *In re Silverman*, 19 A. B. R. 460, 157 Fed. 675 (C. C. A. N. Y.), is broader than the opinion, and the case itself is not out of harmony with the correct principle. Compare post, §§ 2666, 2680.

⁴². Compare, § 2416.

them from pleading the prior adjudication in their favor that the bankrupt is not entitled to be discharged from those claims. No element of an estoppel is involved in this action of the creditors; for, when the bankrupt filed his second petition in bankruptcy and procured himself to be adjudged bankrupt thereof, he voluntarily subjected himself to be examined by any of his creditors as authorized by the Bankruptcy Act."

And the putting of a debt provable in bankruptcy into judgment after the expiration of the time within which to apply for a discharge, creates no new debt so as to entitle the bankrupt to institute a new bankruptcy proceedings.⁴³

§ 2438. Quære, Where Debts in Subsequent Bankruptcy Partly Same, Partly New, and Discharge in First Bankruptcy Refused.—

Where the debts in the subsequent bankruptcy are in part the same as in the first bankruptcy, and in part are different, a difficult question arises as to the operation of the refusal of the discharge in the first proceedings. The bankrupt undoubtedly has a right to apply for discharge from the new debts, and the new creditors may have no ground for barring him therefrom; but should the exercise of that right entail upon the old creditors a relitigation of the entire subject of discharge? The former refusal of discharge is not available as a statutory bar to the new discharge, for it is only the "granting" of a discharge (and in voluntary proceedings within six years) that is a "bar." Moreover, the acts which barred the first discharge were committed in another bankruptcy than the present and probably are not urgeable in the present bankruptcy. At the same time, the debts of the old creditors are still "provable" in the second bankruptcy, and hence are dischargeable thereby. What, then, is the course to be pursued? There are two possible courses open.

Either the old creditor may "bide his time" and urge "res judicata" in reply to the bankrupt's defense of discharge when the old creditor resorts to legal proceedings to enforce his claim against the bankrupt; in which event, however, it might rightly be contended that the debt was "provable" in the second bankruptcy and was not one of those excepted from the operation of discharge, and hence was discharged by the discharge in the second bankruptcy, even if not by the first bankruptcy.⁴⁴

In *re Claff*, 7 A. B. R. 128, 111 Fed. 506 (D. C. Mass.): "Claff was adjudicated bankrupt in 1899, upon a voluntary petition. His discharge was refused for fraudulent concealment of assets. In 1900 he filed a second petition, and seeks a discharge thereunder. That his discharge under the second petition, if obtained, will be no bar to a suit upon a debt scheduled under the first commission, and not proved under the second, seems clear. *Gilbert v. Hebard*, 8 Metc. 129; In *re Drisko*, 2 Low. 430, Fed. Cas. No. 4,090. See *Dean v. Justices*, 173 Mass. 453, 53 N. E. 893. But this fact does not prevent the bank-

⁴³. In *re Schnabel*, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.).

⁴⁴. *Bluthenthal v. Jones*, 19 A. B. R. 268, 208 U. S. 64, quoted post, this same paragraph, § 2438.

rupt from filing a second petition, or from getting a discharge thereunder, for whatever the discharge may be worth. In *re Drisko*, above cited. The discharge is granted, and no exception will be made therein of debts scheduled under the earlier commission. It is more convenient to make the discharge a general one, and to leave its effect to be determined by subsequent proceedings. In *re Marshall Paper Co.*, 4 Am. B. R. 468, 43 C. C. A. 38, 102 Fed. 872 and cases cited; In *re Black* (D. C.), 4 Am. B. R. 471, note, 97 Fed. 493."

Or, on the other hand, the court in its order of discharge in the second bankruptcy might expressly except all debts provable in the first bankruptcy wherein discharge had been refused, although, to be sure, power to make exceptions in orders of discharge is doubtful.

The latter seems to be the proper course; for the defense is the defense of *res judicata* as to the right to a discharge itself and not as to the dischargeability of the particular debt. Were the debt not "provable," or were it one of those excepted from the operation of discharge by § 17 of the Act, it would be proper to wait until it was sought to enforce the debt; then to urge that it was not within those debts enumerated as dischargeable; but, on the contrary, it is, in fact, "provable" and was not "excepted" and therefore is discharged unless the decree of discharge itself is limited.⁴⁵

In *re Kuffler*, 18 A. B. R. 17, 151 Fed. 12 (C. C. A. N. Y., reversing 16 A. B. R. 305): "If the application in the court below had been directed to obtaining a stay of any application for a discharge from the debts scheduled in the former proceedings, and the court below had limited its order accordingly, we should have no difficulty in affirming the order. Obviously it was the principal purpose of the present proceeding to enable the bankrupt to renew his unsuccessful application to be discharged from his debts in the former proceeding, and to that extent to resuscitate the former proceedings. If this were permitted, the creditors who successfully opposed his discharge in the former proceeding would be compelled to litigate over again the issue which had been finally adjudicated in their favor. They should not be subjected to this hardship. If any of these creditors should seek to enforce by an action his debt against the after-acquired property of the bankrupt, not having procured a stay in the second bankruptcy proceeding, he might be met with a discharge in that proceeding as a bar to his action. Under the Act of 1898, the denial of an application for a discharge from debts provable in one proceeding in bankruptcy renders the issue of the right to a discharge *res adjudicata* as to such debts in a subsequent proceeding; and a failure of the bankrupt to apply for a discharge within twelve months after the adjudication in the earlier proceed-

45. Compare, post, § 2680. To same effect, In *re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.); also, *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, affirming 51 Fla. 396; In *re Kuffler*, 22 A. B. R. 289, 168 Fed. 1021 (C. C. A. N. Y., reaffirming In *re Kuffler*, 18 A. B. R. 17, 151 Fed. 12); In *re Pullian*, 22 A. B. R. 513, 171 Fed. 595 (D. C. Tenn.), quoted also, at §§ 2436, 2437; In *re Springer*, 29 A. B. R. 96, 199 Fed. 294 (D. C. N. C.).

Form of exception in second order of discharge: "excepting also such debts as were provable in certain proceedings in bankruptcy in the District Court of the United States for the _____ District of _____ wherein, on the _____ day of _____ 191____, said _____ was duly adjudged bankrupt," *Pollet v. Cosel*, 24 A. B. R. 678, 179 Fed. 488 (C. C. A. Mass.); In *re Kuffler*, 18 A. B. R. 17, 151 Fed. 12 (C. C. A. N. Y.).

ing has the same effect. *Kuntz v. Young*, 12 Am. B. R. 505, 131 Fed. 719. Where the same debts and the same assets are scheduled in the two proceedings, one being commenced subsequent to the termination of the other, it is manifest that the last proceeding is merely an attempt to evade the former one. To permit it would be to sanction a fraud upon the court. As this court said in *In re Fiegenbaum*, 9 Am. B. R. 595, 121 Fed. 69.

"Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, in limine, so flagrant an attempt to circumvent its decrees."

"The present case differs, however, from the *Fiegenbaum Case*, because in that case the second proceeding was commenced within a very short time after the denial of the bankrupt's discharge in the former proceeding, while here two years have elapsed; and it differs in the further and more important fact that some debts are scheduled in the second proceeding which were not provable in the first.

"It is the right of an insolvent debtor who may have acquired property and incurred debts subsequent to an adjudication of bankruptcy to prosecute a second proceeding to obtain his discharge. The effect of an order like the one under review would be to deprive him of that right."

Pollett v. Cosel, 24 A. B. R. 678, 179 Fed. 488 (C. C. A. Mass.): "The bankrupt petitioned for discharge, and the creditor, now the appellee, duly filed his specification of objections thereto, setting out the proceedings in a previous bankruptcy where he had been a creditor. The result was a judgment giving a limited discharge, the limitation being covered by the following words: 'Excepting also such debts as were provable in certain proceedings in bankruptcy in the District Court of the United States for the Southern District of New York, wherein on May 18, 1905, said Robert S. Pollet was duly adjudged a bankrupt.'

"This exception reserved from this discharge the debt of the appellee, as the same was not only provable in the prior proceedings described, but was therein duly proved. The present appeal arose out of this limitation.

"In the prior proceedings the discharge was not in form refused, but the petition therefor was dismissed on the ground that the bankrupt had failed to prosecute, and to appear for examination; laches being apparently specifically assigned.

"We are of the opinion that the judgment of the District Court appealed from was correct; and, aside from our own conclusions in the matter, we should feel called on to sustain it in accordance with our practice of following the courts of appeals in other circuits.

"At the outset we note the fact that § 14 of the Bankruptcy Statute of 1898 provides that: 'Any person may, after the expiration of one month, within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge.'

"It also provides that, if it appears that the bankrupt was unavoidably prevented from filing his application within 12 months, 'it may be filed within but not after the expiration of the next six months.' Here is a positive limitation of 18 months given by statute within which an application for a discharge may be made. If the position of the bankrupt in this case is correct, it amounts to a repeal of this statutory limitation. The fact that it is by indirection, instead of by a delayed application in the original proceeding, is immaterial, because in the indirect form the result would be quite as effectual to the defeat of the clear letter and intention of the statute as if otherwise accomplished.

However, we do not let the case rest on this proposition, because the authorities to which we will refer are conclusive on more general grounds.

"The bankrupt relies on *Bluthenthal v. Jones*, 208 U. S. 64, 66, 19 Am. B. R. 288, 28 Sup. Ct. 192, 52 L. Ed. 390, decided on January 6, 1908. There is nothing in it which helps him. It contains a declaration which is, of course, so far as this case is concerned, a dictum, but which is positively opposed to the appellant."

Bacon v. Buffalo Cold Storage Co., 27 A. B. R. 736, 193 Fed. 34 (C. C. A. Tex.): "The appeal presents the single question whether the failure of a bankrupt to apply for a discharge within the time required by law under an earlier petition is a good ground for denying his discharge when applied for by the bankrupt under a later petition, in which no new assets are scheduled, as to creditors who held provable claims under the first petition, and whether it is proper to grant the discharge limiting the operation of it in cases, as in this case, in which there are also creditors whose claims are not provable under the first petition, to such claims. * * *

"A person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending. If it be shown to the judge that he was unavoidably prevented from filing it within twelve months, it may be filed within, 'but not after the expiration of, the next six months.' Bankruptcy Act, § 14. This is clearly a limitation of 12 months in which to make application for the discharge, with authority conferred on the court to extend it for six months. After the expiration of 18 months, an application for a discharge would be rightfully dismissed; in fact, it has been held that the court has no jurisdiction to grant it. In *re Fahy* (D. C., Iowa), 8 Am. B. R. 354, 116 Fed. 239; In *re Wagner* (D. C., Nev.), 15 Am. B. R. 100, 139 Fed. 87; 2 *Remington on Bankruptcy*, § 2427, and cases cited. Section 14 clearly shows the legislative intention to limit the right to make the application, the period within which the bankrupt must act being specifically stated. If, after the expiration of the time, the bankrupt, by contracting new debts and instituting a second proceeding, could obtain a discharge from debts provable or proved in the first proceeding, the intention of Congress would be defeated. Such construction would make the limitation ineffectual, because the bankrupt could avoid it by instituting the second proceeding. The result of the decisions of the Circuit Courts of Appeals cited by Judge Grubb is right, I think, as a construction of the Act based on the intention shown by the prescribed limitation. To construe the Act otherwise would be to ingraft on it a mode of extending the time for obtaining a discharge beyond 18 months. It seems to me, therefore, that the conclusion is correct as a construction of the Act, whether the doctrine of *res judicata* is applicable or not, that a bankrupt, after the expiration of 18 months from adjudication, is not entitled, on a second proceeding, to a discharge from debts provable in the first."

In *re Westbrook*, 26 A. B. R. 181, 186 Fed. 414 (D. C. Ala.): "The only ground of objection to the discharge is that, as to the objecting creditor, failure to apply for a discharge under the first petition within the time allowed, can be offered as *res adjudicata* to an application to be discharged from the same debt under the second petition, and that the discharge should be restricted so as to except the debt of the objecting creditor from its operation. While the right of the bankruptcy court to so limit the discharge admits of doubt, following the authorities cited below, which constitute the great weight of authority, a discharge will be granted the bankrupt, excluding from its operation the debt of *Odum & Bowers*, the objecting creditor. * * *

"If the bankruptcy court has no authority to limit the discharge, no injury is done, since the court in which the discharge is pleaded will give effect to the discharge, disregarding the limitation. On the other hand, if the court in which the discharge is pleaded can give restricted effect to it, only when the limitation is placed in it by the bankruptcy court, injustice will be done, if it is not inserted, if the bankrupt is rightfully concluded by his failure to seasonably apply for his discharge under the first petition, and authority and reason concur in this last conclusion."

In *re Von Borries*, 21 A. B. R. 849, 168 Fed. 718 (D. C. Wis.): "As to the debts incurred since the proceedings in the northern district of Illinois, and as to the creditors who were not before that tribunal, the bankrupt is entitled to a discharge; there being no objection which reaches such claims. An order may be entered for a qualified discharge in accordance with this opinion."

And if the creditor takes no steps to have the discharge decree provide for an exception of his claim, he will be bound and the debt will be discharged.

Bluthenthal v. Jones, 208 U. S. 64, 19 A. B. R. 288, affirming 51 Fla. 396: "Though *Bluthenthal & Bickart* were notified of the proceedings on the second petition for bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings. Section 1 of the Bankruptcy Act defines a discharge as "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless he has committed one of the six acts specified in that section. Section 17 of the amended act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with four specified exceptions, which do not cover this case. The discharge appears to have been regularly granted, and, as the debt due to *Bluthenthal & Bickart* is not one of the debts which, by the terms of the statute, are excepted from its operation, on the face of the statute the bankrupt was discharged from the debt due to them. There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in § 14 of the Bankruptcy Act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a

previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida, and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge."

And the mere fact that subsequent to the refusal of the first discharge one of the old debts has been reduced to judgment will not avail—the former refusal still remains *res adjudicata*.⁴⁶

§ 2439. Refusal of Discharge under Former Bankruptcy Act Not Res Judicata under Present Act.—But the refusal of a discharge under a former bankruptcy act is not *res adjudicata* upon the question of discharge under the present act.

In *re Hermann*, 4 A. B. R. 139, 102 Fed. 753, 106 Fed. 987 (D. C. N. Y.): "Proceedings in bankruptcy are doubtless in the nature of a suit * * * and no doubt the refusal of a discharge under the Act of 1867 would be *res judicata* upon any subsequent application for a discharge under that act as respects the same debt; and similarly, while a former proceeding is pending, no subsequent application for a discharge from the same debts would be entertained under the same act. But these rules, in my judgment, have no application to proceedings for a discharge under wholly independent and widely separated statutes of bankruptcy, like those of 1867 and of 1898. The provisions regulating discharges are quite different in the two statutes; so that, though a discharge were refused under the Act of 1867, the bankrupt upon the same facts might be entitled to a discharge under the Act of 1898.

"The facts stated in the moving affidavits and the records of this court, furnish a strong presumption that the proceedings for a discharge under the former act were virtually abandoned in 1879, as the bankrupt was not likely to succeed in obtaining it. There were then numerous specifications in opposition to his discharge, two of which were the same as are raised in the present proceeding, and which would bar a discharge under the present act if proved. The former proceeding, which has never been determined by the entry of any order refusing a discharge, can have no greater force as a bar to the present proceeding, however, than if an order of refusal had been in fact entered. But, even if such an order had been entered, and even if the refusal was solely upon grounds which would bar a discharge under the present act, the debtor would, in my judgment, still be at liberty to proceed for a discharge under the Act of 1898 without reference to the Act of 1867, or any proceeding under it; and his right to a discharge now must be determined by the provisions of the present act alone.

"The only effect of a refusal of a discharge under the old Act, was to exclude the debtor from all relief under that act, and to leave his debts existing as before. The Act of 1898, passed twenty years after the repeal of the Act of 1867, marks a new beginning. It is wholly independent of the former act. It

46. In *re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.).

was designed to give to debtors a fresh start in life, freed from the weight of all former debts, except such as are expressly excluded from the operation of the present act. Old debts existing under the former act and kept alive until now by subsequent judgments, are not excepted from the new act, though a discharge from them under the former act was denied. They are, therefore, presumably within the intent of the present statute. The long disability of the debtor under the pressure of his old debts is in effect made by the present act a sufficient punishment for the offences which previously barred his discharge. The new act, as respects discharges, supersedes the old; and its design to give freedom to all debtors upon an honest compliance with its provisions, subject only to its own restrictions, would be clearly thwarted pro tanto, if relief under it were refused merely because similar relief had been refused under the Act of 1867."

§ 2440. Refusal of Discharge under State Bankruptcy or State Insolvency Law Not Res Adjudicata as to Same Debt in Federal Bankruptcy.—Nor is the refusal of a discharge under a state insolvency law res adjudicata in bankruptcy, especially where the record does not show the ground of the refusal.⁴⁷

§ 2441. Refusal of Discharge Not Bar to Subsequent Bankruptcy Petitions nor Adjudications.—Refusal of discharge will not prevent the debtor from filing a subsequent voluntary petition in bankruptcy nor creditors from filing a subsequent petition against him, except as the same may be enjoined for futile and vexatious repetition.⁴⁸

§ 2442. Discharge Not Impeachable Collaterally.—The order of discharge may not be questioned nor attacked collaterally;⁴⁹

Custard v. Wiggenson, 17 A. B. R. 340, 130 Wis. 412: "The order of discharge, therefore, having been put in evidence, was proof of the appellant's discharge in bankruptcy and cannot be impeached collaterally. This provision of the Bankrupt Act, making the order of discharge evidence of the jurisdiction of the court and the regularity of the proceedings, was obviously intended to dispense with proof of antecedent steps in the proceedings."

Unless for absolute want of jurisdiction apparent upon the face of the record, as in cases where the petition for the discharge was filed after eighteen months from the date of adjudication.⁵⁰

§ 2443. But Avoiding Effect of Discharge by Showing Debt Excepted from Its Operation, Not "Collateral Attack."—But the avoiding of the effect of a discharge by showing that one's debt was not "duly scheduled," or otherwise was excepted from the operation of the act, is not a collateral attack on the discharge.⁵¹

47. *In re Bybee*, 10 A. B. R. 761, 124 Fed. 1011 (D. C. Calif.); *Dean v. Justices of the Municipal Court*, 2 A. B. R. 163, 173 Mass. 453; compare post, § 2681.

48. See ante, § 2416, post, § 2579; impliedly, *In re Smith*, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.).

49. *In re Shaffer*, 4 A. B. R. 728, 104

Fed. 982 (D. C. N. Car.).

50. *Obiter*, *In re Fahy*, 8 A. B. R. 354, 116 Fed. 239 (D. C. Iowa), quoted supra, § 2427.

51. *Sutherland v. Lasher*, 11 A. B. R. 780, 41 N. Y. Misc. 251 (affirmed in 87 App. Div. 633); *Schiller v. Weinstein*, 15 A. B. R. 184, 47 N. Y. Misc. 622.

§ 2444. **Nor "Attack" at All.**—Indeed, it is not an attack on the discharge decree at all, but rather a carrying out of its terms; for, by the law itself, the discharge is not to operate upon the debts excepted under § 17 nor upon debts that are not "provable."

§ 2445. **Bankrupt Cannot Voluntarily Surrender Discharge.**—Nor may the bankrupt himself surrender his discharge or vacate it. It can be revoked only in the statutory manner.⁵² But, of course, the bankrupt may revive the discharged debts by new promises.

§ 2446. **Staying Discharge to Permit Creditor to Perfect Rights against Surety or Exempt Property.**—Proceedings upon a petition for discharge may be stayed until a creditor may perfect his rights against a surety or other third person or against the bankrupt's own exempt property, or otherwise secure special remedies, where judgment must be obtained or other steps be taken to perfect such creditors' rights.⁵³

Suggestion in *In re Lewensohn*, 3 A. B. R. 59, § 99 Fed. 73 (D. C. N. Y.): "If a judgment is necessary to prevent the discharge from barring the debt a prosecution of the suit to judgment should be allowed."

Contra, *Bryant v. Kinyon*, 6 A. B. R. 241, 127 Mich. 152 (Mich.): "It is contended, however, that as the defendant was arrested upon a capias, and gave bail, the surety is not discharged, and that a judgment is necessary, and should be permitted, to fix his liability. We think this position is not tenable. The responsibility of the surety is limited by a strict construction of his bond. There can be no liability unless a judgment is procured in the action against the principal, and that can never be for the reason that he is released by his discharge."

52. *In re Shaffer*, 4 A. B. R. 728, 104 Fed. 982 (D. C. N. Car.). Compare, *In re Hawk*, 8 A. B. R. 71, 114 Fed. 916 (C. C. A.).

53. See ante, §§ 648, 1102, 1104, 1105, 1524, 1914, 2200, 2712; *In re Maher*, 22 A. B. R. 290, 169 Fed. 997 (D. C. Ga.); rule affirmed but not applied in *In re Maget*, 23 A. B. R. 14, 173 Fed. 232 (D. C. N. Y.); *In re Marshall Paper Co.*, 2 A. B. R. 653, 102 Fed. 872 (D. C. Mass., reversed, on other grounds, in 4 A. B. R. 468); *Lockwood v. Exchange Bk.*, 190 U. S. 294, 10 A. B. R.

107; suggestion in *Ingram v. Wilson*, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa); *Bell v. Dawson Grocery Co.*, 12 A. B. R. 159, 120 Ga. 628; *In re Brumbaugh*, 12 A. B. R. 204, 128 Fed. 971 (D. C. Penn.); *In re Tiffany*, 17 A. B. R. 296 (D. C. N. Y.).

Compare, where court refused stay to allow creditor to take judgment against a bankrupt contractor in order that the creditor might effect a subcontractor's lien. *In re Goodrich*, 27 A. B. R. 619, 192 Fed. 746 (D. C. Ga.).

CHAPTER LII.

OPPOSITION TO DISCHARGE.

Synopsis of Chapter.

§ 2447. Opposition to Discharge

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- § 2450. Appearance May Be by Attorney.
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- § 2457. Who May Oppose Discharge—Court Itself, Not.
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- § 2516. Thus, Beginning New Business as Agent for Another.
- § 2517. Exact Value of Assets Concealed Need Not Be Capable of Ascertainment, if of Value.
- § 2518. Even if of Small Value, Intentional Concealment Will Bar.
- § 2519. Failure of Creditors to Institute Legal Proceedings to Recover Concealed Property Tends to Rebut.
- § 2520. Amendment of Schedules after Discovery of Concealed Assets, of No Avail.
- § 2520½. Nor Other Aid to Trustee.
- § 2521. Instances Held Sufficient to Bar Discharge for Concealment of Assets.
- § 2522. Instances Held Insufficient to Prove Fraudulent Concealment.

SUBDIVISION "B."

- § 2523. "False Oath" as Bar to Discharge.
- § 2524. Must Be False Oath or False Account.
- § 2525. Oath Must Be Authorized by Statute and Administered by One Authorized.
- § 2526. Sufficient if Administered Either before Testifying or Afterwards.
- § 2527. Must Be in or in Relation to Bankruptcy Proceedings.
- § 2528. "False Oaths" in Poverty Affidavits.
- § 2529. "False Oath" in Hearing upon Petition for Adjudication.
- § 2530. If Not in, nor in Relation to His Own Bankruptcy Proceedings, No Bar.
- § 2531. Whether False Oath in Own Previous Bankruptcy Proceedings, Bar.
- § 2532. False Oath in Bankruptcy Proceedings under Law of 1867 Not Sufficient.
- § 2533. Must Have Been Material.
- § 2534. Material, Though Subject of Little Value, or Exempt, or Not Recoverable.
- § 2535. False Oath Must Be "Knowingly and Fraudulently" Made.
- § 2536. Advice of Counsel to Negative Fraudulent Intent.
- § 2537. Fraudulent Intent Not Necessarily Negated by Fact That Property Not Recoverable.
- § 2538. Nor That Its Value Unascertained.
- § 2539. Nor That It Might Have Been Claimed Exempt.
- § 2539½. But Is Evidence Toward Negating Intent.
- § 2540. False Testimony on "General Examination," "False Oath."
- § 2541. Swearing to Schedules Containing Misstatements or Omissions, "False Oath."

§ 2542. Omitting Creditors from Schedules, or Giving Untrue Liabilities When "False Oath."

§ 2543. Amendment after Discovery of Omission.

SUBDIVISION "C."

§ 2544. Destruction, Failure to Keep and Concealment of Books of Account as Bar to Discharge.

§ 2545. Intent to Conceal Financial Condition Essential.

§ 2546. Intent Inferable from Circumstances.

§ 2547. Property Exempt, or Not Recoverable, etc.—Not Necessarily Negatives Intent to Conceal.

§ 2548. Keeping Books in Same Defective Manner for Long Period Tends to Negative Intent.

§ 2549. No Special Manner of Keeping Books Requisite.

§ 2549½. Omitting Debts to Relatives.

§ 2550. Concealment or Destruction of Books, etc., Which Might Have Aided in Ascertainment of Financial Condition.

SUBDIVISION "D."

§ 2551. Presentation of False Claim or Demand as Bar to Discharge.

SUBDIVISION "E."

§ 2552. Grounds of Opposition to Discharge Added by Amendment of 1903.

§ 2553. Transfer, Removal or Concealment within Four Months, as Bar to Discharge.

§ 2553½. Preferences Not Amounting to Transactions with Intent to Hinder, Delay or Defraud, No Bar.

§ 2554. Must Be within Four Months Preceding Bankruptcy.

§ 2554½. Effect of Failure to Record until within Four Months.

§ 2555. But Property Need Not Be Still Recoverable.

§ 2555½. "Continuing Concealments."

SUBDIVISION "F."

§ 2556. Obtaining Money or Property on Credit on False Statement, in Writing, as Bar to Discharge.

§ 2557. New Ground, Only Available in Bankruptcies Instituted Since Amendment.

§ 2558. Statement before Amendment Sufficient if Proceedings Instituted after Amendment.

§ 2559. Whether Other than Particular Creditor Defrauded May Oppose on This Ground.

§ 2560. First Element "Materially False Statement in Writing."

§ 2561. Written Statement Need Not Be Delivered if Contents Communicated.

§ 2562. Second Element: Must Be by Bankrupt.

§ 2563. But if Made by Agent with Bankrupt's Authority, Sufficient.

§ 2564. Third Element: Must Be Made to Person from Whom Property Obtained.

§ 2565. Whether, if Made to Mercantile Agencies, or in Answer to General Inquiries, a Bar.

§ 2566. Fourth Element: Property Must Be Obtained on Credit Thereby.

§ 2567. Fifth Element: Bankrupt Must Intend to Obtain Property Thereby.

§ 2568. Whether Intent Must Be to Obtain Particular Property Actually Obtained.

§ 2569. Sixth Element: False Statement Must Be Relied on.

§ 2570. "Continuing Representations."

SUBDIVISION "G."

- § 2571. Previous Discharge within Six Years, as Bar to Discharge.
- § 2572. Whether Present Application Be in Involuntary or Voluntary Bankruptcy, Immaterial.
- § 2573. Previous Discharge in Involuntary Proceedings, No Bar.
- § 2574. In Voluntary Proceedings, It Is Bar.
- § 2575. Previous Refusal of Discharge within Six Years Not within Bar, Though Res Judicata as to Old Debts.
- § 2576. This Bar Applicable Where Proceedings Instituted after Amendment of 1903, Though Facts Occurred Beforehand.
- § 2577. Whether "Within Six Years" Measures Time between First and Second Discharge, or between First Discharge and Filing of Second Petition in Bankruptcy.
- § 2578. "Six Years" Does Not Measure Time between Two Adjudications of Bankruptcy.
- § 2579. Jurisdiction to Administer Estate Unimpaired Though Discharge Barred because of Previous Discharge within Six Years.

SUBDIVISION "H."

- § 2580. Refusal to Obey Court's Order or to Answer Question, as Bar to Discharge.
- § 2581. Refusal to Answer Incriminating Questions.
- § 2582. Withholding Discharge until Court Rules Complied with.

DIVISION 4.

- § 2583. Specifications of Objections to Discharge, Pleadings.

SUBDIVISION "A."

- § 2584. Specifications to Be Verified.
- § 2585. But Lack of Verification May Be Waived.
- § 2586. Or Be Supplied by Amendment.
- § 2587. Where Several Objecting Creditors, All May Sign and Verify Same Specifications.
- § 2588. Whether if Several Join in Same, Each Must Sign and Verify.
- § 2589. Whether Verification by Some One with Knowledge Requisite.
- § 2590. Verification by Attorneys Permitted.
- § 2591. Forms of Verification.
- § 2592. Whether Verification Must Be Positive or May Be on Information and Belief.
- § 2593. Specifications to Be Signed.

SUBDIVISION "B."

- § 2594. Specifications to Show Capacity of Objecting Creditor.
- § 2595. All Essential Facts and Elements of Bar to Discharge, to Be Alleged.
- § 2596. "Knowingly and Fraudulently" to Be Alleged Where Act Charged Is an "Offense."
- § 2597. If Act Charged Is an "Offense," Must Appear to Have Been Committed after Bankruptcy, etc.
- § 2598. Acts Charged, to Be Brought within Time Limit.
- § 2599. Distinct Grounds May Be Joined in One Specification.
- § 2600. But Each Ground to Be Separately Stated.
- § 2601. All Grounds Need Not Be Sustained.
- § 2602. Specifications Not to Be Used as "Dagnet" or "Fishing Expedition."

- § 2603. Must Not Be Indefinite nor General nor Argumentative, but Certain and Positive.
- § 2604. No Greater Definiteness Necessary than Nature of Facts Requires.
- § 2605. Whether to Be Pledged "with Certainty of Indictment" Where "Offense" Charged.
- § 2606. Evidence Not to Be Pledged.
- § 2607. Legal Conclusions Not to Be Pledged.
- § 2608. Thus, Allegations in Mere Words of Statute Sufficient Only Where Failure to Keep Books, Ground Charged—Elsewhere Insufficient.
- § 2609. Alternative Allegations Improper.

SUBDIVISION "C."

- § 2610. Defective Specifications; Rights and Remedies.
- § 2611. Whether Specification of One Ground and Proof of Another, a Fatal Variance.
- § 2612. Defective Specifications Waived by Going to Trial without Objection.
- § 2613. Defective Specifications May Be Amended.
- § 2614. Must Be Something in Pleading Whereby to Amend.
- § 2615. Amendment Permissible after Time Limited for Filing Specifications
- § 2616. Even New Ground of Opposition May Be Added.
- § 2617. Amendment to Conform Pleadings to Proof, but Not to Set Up Entirely New Ground after Trial.
- § 2618. Amendment May Be Ordered.
- § 2619. Striking Off Specifications after Amendment for Failing Still to Show Sufficient Grounds.
- § 2620. Amendment May Be Conditioned on Payment of Costs.
- § 2621. Amendment May Be Refused.
- § 2622. Refusal to Permit Amendment Reviewable for Abuse of Discretion.

SUBDIVISION "D."

- § 2623. Answer to Specifications Not Necessary.
- § 2624. But May Be Filed.

DIVISION 5.

SUBDIVISION "A."

- § 2625. Final Hearing on Discharge to Be before Judge.
- § 2626. But Judge May Refer Issues to Special Master.
- § 2627. Motions and Demurrers to Be to Judge, Not to Special Master.

SUBDIVISION "B."

- § 2628. Hearings before Special Master.
- § 2629. Whether Special Master to Exclude Improper Evidence.
- § 2630. Findings of Fact as Well as Evidence to Be Reported.
- § 2631. Also Conclusions of Law.
- § 2632. Exceptions to Special Master's Report and Findings.
- § 2633. Court Presumed to Have Investigated Case on Merits, on Master's Report.
- § 2634. Findings of Fact Not Reversed Except for Clear Error.

SUBDIVISION "C."

- § 2635. Burden of Proof on Opposing Creditor.
- § 2636. But Presumptions of Fact May Shift against Bankrupt, and Compel Rebuttal.

- § 2637. Burden of Proof Is on Objecting Creditor as to Each Element of Ground Charged.
- § 2637½. Proof Aided by Presumptions.
- § 2638. Evidence Need Not Be beyond Reasonable Doubt.
- § 2639. But Where "Offense" Is Charged, Evidence to Be "Clear," "Satisfying" or "Convincing."
- § 2640. Whether Same Degree of Proof Requisite Where Ground Charged Not a Punishable Offense.
- § 2641. "General Examination" of Bankrupt Admissible.
- § 2642. Competent Though Crime Charged.
- § 2643. But of Other Witnesses, Not Admissible.
- § 2644. Unless So Stipulated.
- § 2645. Ordinary Rules Determine Admissibility and Credibility.
- § 2646. Failure to Produce Material Witnesses Who Are Accessible.
- § 2647. Failure of Creditors to Take Steps to Recover Property Alleged Fraudulently Concealed.
- § 2647½. Whether Fraudulent Transfer Decree Binding.
- § 2648. Evasive Testimony of Bankrupt: Credibility.
- § 2649. Contradictory Statements and Incredible Explanations.
- § 2650. Impeachment of Witness by Inherent Improbability of Own Testimony.
- § 2651. Nevertheless Merely Suspicious Circumstances Not Sufficient Where Witness Uncontradicted.
- § 2652. Likewise Mere Evasive Testimony and Inability to Account Reasonably for Assets Not Per Se Proof.
- § 2653. Though Strong Evidence Tending to Discredit.
- § 2654. Judicial Cognizance of Court Records.
- § 2655. Res Judicata and Estoppel.
- § 2656. Discharge Hearing Not Postponed to Await Outcome of Fraudulent Conveyance Suit.
- § 2657. Declarations of Alleged Fraudulent Transferrer.

SUBDIVISION "D."

- § 2658. Costs on Discharge.
- § 2659. Power to Award Costs Inherent.
- § 2660. Referee Allowed Compensation as Special Master on Discharge.
- § 2661. Awarding Costs against Creditors.

§ 2447. Opposition to Discharge.—The judge hears the application for discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be heard fully; and he investigates the merits of the application, and discharges the applicant unless he has done some one or more of the acts mentioned by the statute as barring his discharge.¹

All questions arising upon a bankrupt's application for a discharge are for the judge and are expressly withheld from the referee.²

1. Bankr. Act, § 14 (b); Gen. Ord. XXXII; In re Daugherty, 26 A. B. R. 550, 189 Fed. 239 (D. C. Ky.).

2. Bankr. Act, §§ 38, 14; also, In re Johnson, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ark.).

DIVISION 1.

ENTRY OF APPEARANCE AND FILING OF SPECIFICATIONS.

§ 2448. Entry of Appearance and Filing of Specifications.—After the filing of the petition and at or before the time announced in the notice to creditors for its hearing, any interested party desiring to oppose the granting of the discharge, may enter his appearance with the clerk or before the judge, in opposition thereto, and is then allowed ten days time thereafter within which to file specifications in writing of the grounds of his opposition thereto; but such time may be extended by order of the judge.³

Compare, *In re Clothier*, 6 A. B. R. 203, 108 Fed. 199 (D. C. Pa.): "General Order 32 should be strictly complied with, and failure so to do will only be excused when excellent reasons therefor are shown to the court."

If specifications of objections to the discharge are not filed, the discharge will be granted.⁴

§ 2449. Entry of Appearance on Time Essential.—Entry of appearance within such time is absolutely essential to the right to file specifications in opposition to discharge.⁵

The objector, however, has the entire day upon which the creditors are required to show cause why the discharge should not be granted in which to enter his appearance.⁶ The filing of the specifications before the return day is equivalent to an appearance.⁷

If no objection is made, the court will presume that no reason exists for not granting a discharge.⁸

§ 2450. Appearance May Be by Attorney.—Duly admitted attorneys at law may enter appearance in behalf of their clients, without written power of attorney.⁹

§ 2451. Entry of Appearance Gives Ten Days Time to File Specifications.—The operation of such entry of appearance is to give the opposing creditor ten days time within which to file written specifications of his grounds of opposition.¹⁰

3. Gen. Ord. XXXII. *In re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

Prosecuting Objections in Forma Pauperis.—*In re Guilbert*, 18 A. B. R. 830, 154 Fed. 676 (D. C. Pa.).

4. *In re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.).

5. *In re Gainsburg*, 12 A. B. R. 459, 130 Fed. 627 (D. C. Penn.); *In re Grant*, 14 A. B. R. 398, 135 Fed. 889 (D. C. Pa.); *In re Albrecht*, 5 A. B. R. 223, 104 Fed. 974 (D. C. Pa.). Analogously, as to filing specifications, *In*

re Clothier, 6 A. B. R. 203, 108 Fed. 199 (D. C. Pa.). *In re Young*, 20 A. B. R. 697, 162 Fed. 912 (D. C. Pa.).

6. *In re Barrager*, 27 A. B. R. 366, 191 Fed. 247 (D. C. Ia.).

7. *In re Magen Bros. Co.*, 27 A. B. R. 729, 192 Fed. 883 (C. C. A. Pa.).

8. *In re Royal*, 7 A. B. R. 636, 113 Fed. 140 (D. C. N. C.).

9. *In re Gasser*, 5 A. B. R. 32, 104 Fed. 537 (C. C. A. Minn.).

10. *In re Barrager*, 27 A. B. R. 366, 191 Fed. 247 (D. C. Ia.).

§ 2452. Specifications to Be Filed in Writing.—Specifications of the grounds of opposition to the discharge must be filed in writing.¹¹

And the filing of specification in opposition is a prerequisite to the introduction of any evidence against the discharge.¹²

§ 2453. Not Filed within Ten Days, Dismissed.—Specifications not filed within the time limited will be dismissed.¹³

§ 2454. Time Extended but Only for "Good Cause."—Such time may be extended by the judge, for good cause.¹⁴

And it has been held that such extension may be applied for even after the expiration of the original time, if before the discharge is granted.¹⁵

In *re Levin*, 23 A. B. R. 845, 173 Fed. 119 (C. C. A. Mass.): "The motion for an extension of time was here filed more than ten days after the return day. General Order 32 in bankruptcy reads as follows: 'A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.' The petitioner contends that this order limits the entry of the creditor's appearance in opposition to the discharge to the return day itself, without authority in the court to extend the time for any cause whatsoever. The petitioner contends further, and in the alternative, that even if the time of entry may be extended somewhat, yet no extension can be granted unless the creditor's motion for an extension shall have been filed within ten days after the return day. The respondent creditor, on the other hand, contends that to grant an extension of time, both for appearance and for filing specifications, is within the discretion of the court, and that this discretion may be exercised at any time before the discharge is granted. * * * Considering that the grammatical construction of General Order 32 leans no more to the petitioner's contention than to that of the respondent, considering the general convenience of the parties which rules are made to guard and to serve, considering the construction put upon the language by eminent judges, a construction acquiesced in by suitors, and accepted by treaties on bankruptcy, we are of opinion that the authority of the District Court was sufficient, and that the petition to revise should be dismissed, with costs."

And good cause must be shown.¹⁶

§ 2455. Bankrupt to Attend Hearing: No Order Necessary: No Reimbursement of Expenses.—The bankrupt must present himself at the hearing upon his application for discharge, and is not permitted by

11. Gen. Ord. XXXII; In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

12. In *re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.).

13. In *re Albrecht*, 5 A. B. R. 223, 104 Fed. 974 (D. C. Pa.); In *re Clothier*, 6 A. B. R. 203, 108 Fed. 199 (D. C. Pa.).

14. Gen. Ord. XXXII; In *re Levin*, 23 A. B. R. 845, 173 Fed. 119 (C. C. A. Mass.); In *re Clothier*, 6 A. B. R. 203,

108 Fed. 199 (D. C. Pa.).

15. (1867) In *re Levin*, Fed. Cas. No. 8291, 14 N. B. R. 385; (1867) In *re Filley*, 2 Cent. Law J. 419. Compare, In *re Frice*, 2 A. B. R. 674, 96 Fed. 611 (D. C. Iowa), although, in this case, the judge seemed to feel it necessary to make the extension by way of a "nunc pro tunc" order.

16. In *re Clothier*, 6 A. B. R. 203, 108 Fed. 199 (D. C. Penn.).

absence to defeat the creditors from proving their grounds of opposition.¹⁷ He must attend without being ordered to do so;¹⁸ and he is not entitled to reimbursement of expenses in so doing.¹⁹

§ 2456. Death Not to Abate Opposition Proceedings.—The death of the bankrupt will not abate the proceedings in opposition to his discharge.²⁰

DIVISION 2.

WHO MAY OPPOSE DISCHARGE.

§ 2457. Who May Oppose Discharge—Court Itself, Not.—The court will not itself seek for grounds to refuse a discharge: grounds must be properly presented by parties.²¹

In *re Thomas*, 1 A. B. R. 515, 92 Fed. 912 (D. C. Iowa): "Section 14, paragraph b, makes it the duty of the judge to grant the discharge, provided the requisites as to notice, etc., have been observed, unless one of the two grounds in said paragraph stated is proven. The duty of proving that such ground exists is on the opposing creditors."

But the court will not grant a discharge until the law as to procedure and the rules of court have been complied with.²²

The court will not grant a discharge until the termination of contempt proceedings, where such proceedings are pending against the bankrupt.²³

No "certificate of conformity," however, is required under the present act, as was required under the former act.^{23a}

It has been held that specifications of objections to discharge which not only fail to show the objector is a party in interest, but affirmatively show he will not be affected by a discharge, as that his claim is not a dischargeable one, are fatally defective, and present no issue that should be considered or determined; and that the court may take judicial notice

17. Bankr. Act, § 7 (1). In *re Shanker*, 15 A. B. R. 109, 138 Fed. 862 (D. C. Pa.). Compare, as to general examination after entry of opposition to discharge, In *re Price*, 1 A. B. R. 419, 91 Fed. 635 (D. C. N. Y.).

18. In *re Shanker*, 15 A. B. R. 109, 138 Fed. 862 (D. C. Pa.).

19. Obiter, In *re Shanker*, 15 A. B. R. 109, 138 Fed. 862 (D. C. Pa.).

20. In *re Parker*, 1 A. B. R. 615 (Ref. Kans.). Compare, "Intervening Death Does Not Affect Right to Discharge," ante, § 2421.

21. In *re Hixon*, 1 A. B. R. 610, 93 Fed. 440 (D. C. Iowa); In *re Royal*, 7 A. B. R. 636, 113 Fed. 140 (D. C. N. Car.); *Strause v. Hooper*, 5 A. B. R. 224, 230, 105 Fed. 590 (D. C. N. C.); In *re Holman*, 1 A. B. R. 603, 92 Fed. 512 (D. C. Iowa); [1867] In *re Schuy-*

ler, 3 Ben. 200, Fed. Cases 12,494; [1867] In *re Rosenfeld*, 2 N. B. Reg. 117, Fed. Cases 12,057; impliedly (but perhaps remote), *Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills.).

22. *Strause v. Hooper*, 5 A. B. R. 224, 230, 105 Fed. 590 (D. C. N. C.). Obiter, and inferentially, In *re Thomas*, 1 A. B. R. 515, 92 Fed. 912 (D. C. Iowa). Instance, analogously, discharge vacated for failure to file separate findings of fact and law, In *re Rauchenplat*, 9 A. B. R. 765 (D. C. Porto Rico). Compare, "Duty of Court Sometimes to Withhold Confirmation of Composition on Own Motion," ante, § 2376.

23. In *re Kretsch*, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.).

23a. See ante, § 2428½.

thereof though the specifications are not objected to on that ground.²⁴

The court will not itself seek for grounds to refuse a discharge; grounds properly must be presented by parties.

Bragrassa v. St. Louis Cycle, 5 A. B. R. 700, 107 Fed. 77 (C. C. A. Tex.): "It is not the duty of the court, on its own motion, to seek out grounds to defeat a discharge, where the statutory prerequisites in the bankruptcy proceedings have been met."

§ 2458. Trustee May Oppose.—Before the Amendment of 1910, the trustee was not, as such, a proper party to oppose the discharge.²⁵ However, the Bankruptcy Act now specifically makes the trustee a "party in interest" for the purpose of opposing the bankrupt's discharge, though the trustee will not be entitled to do so until authorized at a meeting of creditors for that purpose.²⁶

The right of the trustee to object to the discharge of the bankrupt depends entirely on the action taken at the meeting of the creditors called in pursuance of the statutory provision; and neither the referee nor the court are authorized to restrict or condition him in the proper exercise thereof.

In *re Churchill*, 28 A. B. R. 603, 197 Fed. 114 (D. C. Wis.): "In my judgment the effect of the Act is to grant to the trustee the right to oppose a discharge, provided only the creditors, at a meeting called for that purpose, shall first authorize him to do so. The Act gives to creditors the privilege of determining whether such right be granted to the trustee; but, having determined to authorize him, his right to exercise, and the extent of, such authority is based upon the statute. The action of the creditors is merely a prerequisite. In other words, the action of the creditors, when taken, serves to put him in the same position and to exercise the rights which 'parties in interest' may exercise as a matter of course and without precedent authorization from any one. From this it must follow that, when the creditors take such step, the trustee can exercise his authority by presenting 'proofs and pleas,' and that he must, under the statute, be given 'a reasonable opportunity to be fully heard.' Whether a trustee, being authorized as contemplated by the statute, is in duty bound to exercise such authority, may be open to question, and is not necessary to be decided at this time. But the right to exercise the authority, having been granted or perfected as contemplated by the statute, is no more subject to denial by the court than is the same right residing in 'parties in interest.' By committing to the creditors' meeting the privilege of determining whether the trustee shall have and exercise such right, the law, it seems

24. In *re Servis*, 15 A. B. R. 271 (D. C. Iowa); *Hanan v. Long*, 32 A. B. R. 132, 134 N. Y. Supp. 786, 150 App. Div. 327.

25. Compare *contra* before the Amendment of 1910, that he may be competent if estate still unsettled, In *re Levey*, 13 A. B. R. 312, 133 Fed. 572 (D. C. N. Y.).

26. See ante, §§ 565½, 593½. Bankr. Act, § 14b, as amended in 1910: "The judge shall hear the application for a discharge and such proofs and pleas

as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate, etc. * * * Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose." In *re Hockman*, 30 A. B. R. 921, 205 Fed. 330 (D. C. Pa.).

to me, denies to the referee, or to the court, any discretion to withhold such right and the power of its exercise from the trustee. It must also follow from this that neither the court nor the referee can, in advance, annex to the trustee's right conditions which are repugnant to its free, or at least its reasonable, exercise. Therefore the conditions denying to the trustee reimbursement for his costs and reasonable expenses in exercising his authority should not have been imposed. What is above stated is true of the condition that the order granting to the trustee authority to oppose the discharge shall not delay the final settlement of the estate more than 60 days. The trustee, if he participate in the proceedings to oppose the discharge, must do so according to the usual course and subject to any reasonable delays that may occur. The expedition of the proceedings is not within his sole control or discretion. All he can do is to proceed with reasonable diligence, and, if he be limited in advance as to time, compliance with such conditions might frustrate the object sought to be accomplished by the authority granted him."

§ 2459. Any "Party in Interest," and Only Such, May Oppose.—Any party in interest, and only such, may oppose the bankrupts' discharge.²⁷

In *re Levey*, 13 A. B. R. 314, 133 Fed. 572 (D. C. N. Y.): "By implication parties in interest only may oppose the discharge of the bankrupt. There is no express provision declaring who may oppose."

The Amendment of 1910 to § 14 expressly makes the trustee a party in interest sufficient to oppose discharge of bankrupts.²⁸

§ 2460. Must Have Pecuniary Interest.—To be a "party in interest" within the purview of this provision he must have a pecuniary interest.²⁹

In *re Levey*, 13 A. B. R. 314, 133 Fed. 572 (D. C. N. Y.): "This court is of the opinion that it was the purpose of Congress to enable any person having a personal pecuniary interest, or a representative pecuniary interest in preventing a discharge, to oppose the discharge of the bankrupt."

And the fact that the bankrupt has scheduled the person as a creditor will imply that he is a "party in interest."³⁰ An equitable claim is sufficient to make the holder such a party in interest.³¹ An unliquidated claim is sufficient,³² so also is a contested claim.³³

²⁷. Impliedly, Bankr. Act, § 14 (a): " * * * hear * * * such proofs and pleas as may be made in opposition thereto by parties in interest, at such times as will give parties in interest. * * * "

In *re Servis*, 15 A. B. R. 271, 140 Fed. 222 (D. C. Iowa); *Hanan v. Long*, 32 A. B. R. 132, 134 N. Y. Supp. 786, 150 App. Div. 327; *Bacon v. Buffalo Cold Storage Co.*, 27 A. B. R. 736, 193 Fed. 34 (C. C. A. Tex.). Compare, analogously, In *re Comstock*, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.), quoted at § 2375.

²⁸. See Bankr. Act, § 14b, as amended in 1910.

²⁹. In *re Frice*, 2 A. B. R. 674, 96 Fed. 611 (D. C. Iowa).

³⁰. In *re Frice*, 2 A. B. R. 674, 96 Fed. 611 (D. C. Iowa); inferentially, In *re Wolke*, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.); In *re Barrager*, 27 A. B. R. 366, 191 Fed. 247 (D. C. Iowa).

³¹. [1867] In *re Tebbetts*, Fed. Cases No. 13,817. Obiter, In *re Conroy*, 14 A. B. R. 249, 134 Fed. 764 (D. C. Pa.).

³². [1867] *Ex parte Traphagen*, Fed. Cases No. 14,140.

³³. In *re Conroy*, 14 A. B. R. 249, 134 Fed. 764 (D. C. Pa.); [1867] In *re Belden*, Fed. Cases No. 1,238. Compare, obiter, In *re Nathanson*, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

It has been held that a nondischargeable claim is not sufficient.³⁴

But such cannot be the right holding, since the Amendments of 1903 and 1910 have made the obtaining of property on credit on a materially false statement in writing a ground itself of opposition to discharge.³⁵ So that a creditor from whom goods have been obtained on credit by a false written statement is not estopped from opposing the discharge on that ground even if he proves his claim for sharing in dividends.^{35a}

Doubtless, the assignee of a creditor's claim is competent,³⁶ even though he has purchased for the very purpose of opposition.³⁷

§ 2461. Need Not Have Proved, nor Have "Provable," Claim.—

But the party in interest need not have actually proved his claim,³⁸ and perhaps he need not even have a "provable" claim,³⁹ or his claim may be no longer "provable" provided he has interest otherwise. Thus, the holder of a contingent claim may be a "party in interest,"⁴⁰ likewise, a creditor who has not proved his claim within the year and consequently cannot share in the dividends, or who has not proved his claim at all.⁴¹ And a creditor whose claim may be barred by interposition of the statute of limitations is, nevertheless, clearly competent.⁴²

§ 2462. Whether Other than One from Whom Property Obtained by False Representations May Oppose on That Ground.—It is ques-

34. In re Servis, 15 A. B. R. 271, 140 Fed. 222 (D. C. Iowa); Hanan v. Long, 32 A. B. R. 132, 134 N. Y. Supp. 786, 150 App. Div. 327. Contra, In re Lewis, 20 A. B. R. 711, 163 Fed. 137 (D. C. N. Y.).

Contra necessarily, where the ground of opposition is the obtaining of goods on false written statement and where the objecting creditor is the creditor defrauded by the false pretense. In re Reed, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

Releasing the Bankrupt from Claims Founded on False Statement Estopping Creditor from Opposing Discharge.—It has been held, in one case, that where a creditor, for valuable consideration, releases a debtor from all claims raised out of a false statement he had made to the creditor, such creditor thereupon surrendering the statements, the creditor will be estopped from opposing the bankrupt's discharge on that ground. In re Russell, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.). But, if such surrender and passing of consideration were made in withholding from opposition to discharge, the whole transaction might be illegal under § 29b, if the other facts warranted.

35. In re Lewis, 20 A. B. R. 711, 163

Fed. 137 (D. C. N. Y.); Haley v. Pope, 30 A. B. R. 644, 206 Fed. 266 (C. C. A. Cal.); In re Reed, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

35a. In re Reed, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

36. Compare, analogously, In re Comstock, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.), quoted at § 2375; In re Reed, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

37. Analogously, In re Comstock, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.), quoted at § 2375.

38. In re Frice, 2 A. B. R. 674, 96 Fed. 611 (D. C. Iowa); In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

39. Contra, obiter, In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

40. In re Conroy, 14 A. B. R. 251, 134 Fed. 764 (D. C. Pa.).

41. Analogously (vacating of discharge), In re Beinberg, 9 A. B. R. 601, 121 Fed. 942 (D. C. N. Y.); In re Frice, 2 A. B. R. 674, 96 Fed. 611 (D. C. Iowa). Compare, to similar effect, obiter, In re Walker, 3 A. B. R. 35 (D. C. N. Dak.). Compare, post, § 2809.

42. In re Westbrook, 26 A. B. R. 181, 186 Fed. 414 (D. C. Ala.).

tioned whether any other person than the one from whom property was obtained by "materially false representations in writing" may oppose the bankrupt's discharge on that ground.⁴³ But the better reason is that any creditor, or other party in interest, may so oppose the discharge, whether or not he be the party extending the credit or to whom the representations were made or from whom the goods were obtained.⁴⁴

§ 2463. Whether Objecting Creditor's Loss of Capacity Pending Hearing Compels Dismissal of Specifications.—Where all creditors opposing discharge dropped out, one by one, except apparently a partnership, the dissolution of the partnership has been held to work a discontinuance of the prosecution. Recommendations of the special master to refuse the discharge have been, on that account, disapproved.⁴⁵

The fact that objecting creditors have withdrawn their opposition should have no weight if the court is convinced that the discharge should not be granted; but may properly be considered where the court is in doubt.⁴⁷

§ 2463¼. One Creditor Prosecuting Objections of Another.—One creditor may adopt and prosecute the objections of another creditor, after the latter has declared his unwillingness to go on and his intention to abandon the objections.⁴⁸

Likewise, one creditor, whose own specifications are insufficient, may in the discretion of the court be permitted to avail himself of specifications filed by other creditors who have failed to appear to prove them.^{48a}

§ 2463½. Procedure Where Trustee Is to Object.—By the Amendment of 1910, making the trustee a competent party to oppose the discharge of a bankrupt, it is provided that he shall enter such opposition only when authorized at a meeting of creditors so to do.⁴⁹ Such meeting is to be held upon ten days notice,⁵⁰ and the authorization is to be determined by the usual rule of action by creditors at their meetings.⁵¹ Authorization by the court alone is insufficient, even though made at a meeting of creditors or at the time and place where such a meeting has been duly called. "Authorized at a meeting of creditors" means authorized *by* a meeting of creditors.

In the event the trustee is authorized to oppose the discharge, the

43. In re Dresser, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.).

44. In re Harr, 16 A. B. R. 216, 143 Fed. 421 (D. C. Mo.); In re Kretz et al., 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.). Obiter, Talcott v. Friend, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills.), quoted at § 2559.

46. In re Hendrick, 16 A. B. R. 218, 143 Fed. 647 (D. C. Conn.).

47. In re Hammerstein, 26 A. B. R.

757, 189 Fed. 37 (C. C. A. N. Y.).

48. In re Guilbert, 18 A. B. R. 830, 154 Fed. 676 (D. C. Pa.); (1867) In re Houghton Fed. Cas. 6730, 2 Law. 328, 10 N. B. R. 337.

48a. Obiter, In re Wetmore, 6 A. B. R. 703, 102 Fed. 290 (Spec. Master N. Y.).

49. See Bankr. Act, § 14b; also, see ante, §§ 940¼, 940½, 565¼, 593½.

50. See ante, § 940½.

51. See ante, § 940½.

expense of the opposition is chargeable out of the estate, as part of the costs of administration.⁵²

But such costs cannot be charged against the estate, even though successful where creditors make the opposition and not the trustee, nor when there is no authorization by the creditors at a meeting called for that purpose.⁵³

See report No. 691 of the Senate Judiciary Committee, Sixty-First Congress, Second Session: "Thereby the expense of the proceedings in opposition to discharge will be spread over all the creditors and not be borne by a single creditor who might file objections."

DIVISION 3.

GENERAL NATURE AND GROUNDS OF OPPOSITION.

§ 2464. Opposition to Discharge Not Criminal Prosecution, and Criminal Law Rules Not Applicable.—Opposition to a discharge is not a criminal prosecution, and the rules of evidence and practice in criminal cases do not prevail.⁵⁴

In re Dresser, 16 A. B. R. 562, 146 Fed. 383 (C. C. A. N. Y.): "The provisions of the section are not to receive the strict construction given to criminal statutes, but should receive a reasonable one to effectuate the intention of Congress, so far as that can be ascertained by the language employed."

Thus, the use of the bankrupt's former testimony is not forbidden.⁵⁵

§ 2465. Refusal of Discharge Not Imposition of Penalty nor Forfeiture.—Nor is the refusal to grant a discharge the imposition of a penalty or forfeiture.⁵⁶

§ 2466. No Constitutional Right to Discharge.—There is no constitutional right to a discharge; and regulations concerning discharge do not make the law unconstitutional.⁵⁷

Impliedly, *Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills.,

^{52.} But compare *In re Kyte*, 26 A. B. R. 507, 189 Fed. 531 (D. C. Pa.), wherein the doctrine laid down by the court was broader than the facts required since in the case *In re Kyte* neither was the trustee the person objecting nor was there any authorization of opposition to the discharge at a meeting of creditors.

^{53.} (Though it does not appear that this decision was rendered after the amendment of 1910, authorizing opposition by the trustee). *In re Kyte*, 26 A. B. R. 507, 189 Fed. 531 (D. C. Pa.), quoted at § 2060½.

^{54.} *In re Gaylord*, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y.). Compare, *In re Dauchy*, 10 A. B. R. 527, 122 Fed. 688 (D. C. N. Y.). Obiter, *In re Levey*, 13 A. B. R. 317, 133 Fed. 572 (D.

C. N. Y.). *In re Dow*, 5 A. B. R. 400 (D. C. Iowa); *In re Dresser*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.); *In re Rochford*, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.); *Kuntz v. Young*, 12 A. B. R. 505, 131 Fed. 722 (C. C. A. Minn.).

^{55.} *In re Gaylord*, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y.); *In re Dow*, 5 A. B. R. 400 (D. C. Iowa). Obiter, *In re Levey*, 13 A. B. R. 317, 133 Fed. 572 (D. C. N. Y.). Compare, *In re Dauchy*, 10 A. B. R. 527, 122 Fed. 688 (D. C. N. Y.).

^{56.} *In re Leslie*, 9 A. B. R. 561, 119 Fed. 409 (D. C. N. Y.); *In re Dresser*, 13 A. B. R. 636, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.).

^{57.} Obiter, *In re Neely*, 12 A. B. R. 407 (Ref. N. Y.). Compare ante, § 12.

affirmed sub nom. *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31): "Releasing an insolvent debtor from his debts is an act of grace."

§ 2467. Act Liberal Towards Bankrupt as to Discharge—Strict Construction in His Favor.—The act is very liberal towards the bankrupt as to his discharge, and strict construction of the terms under which opposition will be sustained are had in favor of the bankrupt's discharge.⁵⁸

Compare, obiter, *In re Glass*, 9 A. B. R. 393, 119 Fed. 509 (D. C. Tenn.): "The bankruptcy statute being very liberal to the debtor in the matter of his discharge, confining the grounds of opposition to conduct on his part of a criminal nature or a quasi criminal carelessness and negligence, he should not be allowed to receive the acquittance of the statute because of any embarrassment or obstructions encountered by his creditors in presenting their opposition to his application for it. Only negligence of a culpable character on their part should debar them from the benefit of Revised Statutes, § 954, as to amendment of their specifications; and these, it seems to me, are the considerations that should control the court in the exercise of its discretion in the premises."

Section 14 (b) provides the judge "shall" grant the discharge unless certain acts are proved, and the leading act consists of offenses prohibited as crimes. Moreover, the definitions are so surrounded with qualifications in favor of the bankrupt as to indicate clearly the intention of Congress that a strict construction of the act in favor of the bankrupt, so far as it relates to opposition to discharge, must prevail.

But compare, *In re Scott*, 11 A. B. R. 328, 126 Fed. 981 (D. C. Del.): "Statutory provisions regulating the conditions on which bankrupts may be discharged are remedial in their nature with respect to the bankrupts or to their creditors, or to both, and the strict rules of construction or interpretation appropriate to retroactive or retrospective laws are inapplicable to them."

And compare also, *In re Breitling*, 13 A. B. R. 126, 133 Fed. 146 (C. C. A. Ills.): "The Act requires the fullest disclosure, the utmost good faith, the surrender of all his estate not exempt by the Act. It is well observed by Judge Brown that 'a discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would not be only a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy.'"

Compare, to similar effect, *In re Lowenstein*, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y.—subsequently district judge): "I have hesitated to find that the bankrupt's verification of schedules which omitted assets of such trifling value constituted knowingly and fraudulently making a false oath; but if a man wants to obtain through the Bankruptcy Act a discharge from his debts, he must in good faith turn over all his assets to his creditors."

And compare, also, *In re Barton Bros. Produce Co.*, 14 A. B. R. 505, 133 Fed. 355 (C. C. A. Ark.): "The spirit of the Bankrupt Act is commendable. Its purpose is to release the honest debtor from the burden of debts which he is unable to longer carry; to give freer play to his energies and enterprises, that he may thereafter be better able to support himself and those dependent upon his earnings, and thereby be in position to render a better service to the

⁵⁸. And compare also, *In re Baudouine*, 3 A. B. R. 55, 96 Fed. 539 (D. C. N. Y.).

State and to society. This beneficent policy is conditional always upon the bankrupt's full and complete surrender of all his unexempt property for the benefit of his creditors. He must be honest in this respect. He must neither conceal nor withhold knowingly anything from his creditors which they are entitled, under the law, to know or receive. Whenever the court is impressed with the belief, after due inquiry and examination, that in the main the bankrupt has intended and tried to comply with the law, he should be dealt with liberally on his petition for manumission from his debts. On the other hand, in order to obstruct gross abuses of the spirit of the Bankrupt Act, that it may not aid the dishonest debtor in being acquitted of his honest debts, while withholding aught that he should surrender for the benefit of his creditors, it is the duty of the court to look into the heart of his transactions."

§ 2467½. **Whether Moral Turpitude Involved.**—It is to be observed that of the six grounds for refusing discharge recited in Bankr. Act, § 14b, all except the last two (which stand by themselves on grounds that affect the administration of the law) imply moral turpitude on the part of the bankrupt.⁵⁹

§ 2468. **Right to Discharge and Effect of Discharge, Distinct Propositions.**—The right to a discharge and the effect of a discharge are entirely distinct matters.⁶⁰

In re McCarty, 7 A. B. R. 40, 111 Fed. 151 (D. C. Ills): "When a bankrupt files his application for discharge, the only facts pleadable in opposition thereto are the causes mentioned in § 14 of the act. Unless the bankrupt has committed some one of the offenses described therein, the court must discharge him. Section 17 of the Bankrupt Law reaches further, but it does not control this case. The right to a discharge and the effect of a discharge are entirely distinct propositions. Section 14 fixes the right to a discharge. Section 17 goes to the effect of a discharge. The question before the court is as to the right of the bankrupt to his discharge. The other questions—the effect of such discharge if, in the future, it shall be pleaded in bar of the collection of the judgment in question—will arise in the proper tribunal where such collection is sought to be enforced."

In re Rhutassel, 2 A. B. R. 697, 96 Fed. 579 (D. C. Iowa): "Under the provisions of the Bankrupt Act, there are certain matters inhering in the conduct of a bankrupt which will defeat the granting of a discharge; and there are other matters inhering in or connected with the character of certain claims which except them from the effect of a discharge, if granted. To defeat the right to a discharge, it must be shown that the bankrupt has committed an offense punishable by imprisonment under the provisions of the act, or, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or

⁵⁹ Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.).

⁶⁰ See post, §§ 2662, 2663. In re Carmichael, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa); In re Lieber, 3 A. B. R. 217 (Special Master Pa.); impliedly, In re Tinker, 3 A. B. R. 580, 99 Fed. 79 (D. C. N. Y.); In re Mussev, 3 A. B. R. 592, 99 Fed. 71 (D. C. Mass.), quoted post, § 2662; In re

Marshall Paper Co., 4 A. B. R. 468, 102 Fed. 872 (C. C. A. Mass.); In re Thomas, 1 A. B. R. 515, 92 Fed. 912 (D. C. Iowa), quoted post, § 2662; Schiller v. Weinstein, 15 A. B. R. 183, 47 N. Y. Misc. 622, quoted post, § 2662; Talcott v. Friend, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills., affirmed sub nom Friend v. Talcott, 228 U. S. 27, 30 A. B. R. 31).

records from which this true condition might be ascertained. Section 14 of Bankrupt Act. The effect of a discharge, when granted, is declared in § 17. * * * As a matter of pleading, the petition presents only the question whether the bankrupt is entitled to a discharge, and does not tender any issue touching the effect of the discharge, if granted, upon particular debts or claims. In opposition to the petition, creditors are entitled to aver and prove any matter which the act declares shall bar the granting of a discharge, but it would certainly be no ground for refusing a discharge if it appeared that there were claims in existence which a discharge would not bar or release. The right to a discharge is one thing, and the effect of it, when granted, is another, and wholly distinct, proposition. The only issue tendered by the petition is the right to a discharge, and the only facts properly pleadable in opposition thereto are those which show that under the provisions of § 14 the bankrupt is not entitled to a discharge. The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim, and the debtor pleads his discharge in bar thereof."

§ 2469. Unless Bankrupt Commits One of Acts Prohibited His Discharge "Shall" Be Granted.—Unless the bankrupt has committed some one or more of the acts prohibited by the Bankrupt Act, his discharge "shall" be granted.⁶¹

And § 14 (b) prescribes what acts will bar discharge.

Fellows v. Freudenthal, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.): "The Bankruptcy Act is imperative in granting to the bankrupt the right to a discharge 'unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition. * * *'"

In *re Marshall Paper Co.*, 4 A. B. R. 468, 102 Fed. 872 (C. C. A. Mass.): "The court is not authorized to deny the application for discharge upon a ground not set forth in this section. * * * A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, 'investigate the merits

⁶¹ See Bankr. Act, § 14 (b); In *re McCarty*, 7 A. B. R. 40, 111 Fed. 151 (D. C. Ills.), quoted post, § 2663; In *re Frank*, 6 A. B. R. 156 (D. C. Penn.); *Strause v. Hooper*, 5 A. B. R. 230, 105 Fed. 590 (D. C. N. Car.); In *re Howden*, 7 A. B. R. 193, 111 Fed. 723 (D. C. N. Y.); In *re Wetmore*, 6 A. B. R. 703 (Ref. N. Y.); In *re Miller*, 13 A. B. R. 345, 133 Fed. 1017 (D. C. Pa.); In *re Blalock*, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.); In *re Thomas*, 1 A. B. R. 515, 92 Fed. 912 (D. C. Iowa); In *re Hixon*, 1 A. B. R. 610, 93 Fed. 440 (D. C. Iowa); inferentially, In *re Mussey*, 3 A. B. R. 592, 99 Fed. 710 (D. C. Mass.); In *re Peacock*, 4 A. B. R. 136, 101 Fed. 560 (D. C. N. Car.); In *re McGurn*, 4 A. B. R. 459, 102 Fed. 743 (D. C. Nev.); In *re Black*, 4 A. B. R. 471 (note), 97 Fed. 493 (D. C. Calif.)

But it is improper to say he is entitled to his discharge unless he has committed an offense punishable by

the Bankrupt Act, for his discharge would equally be barred by his destruction of books, etc., which is not an "offense."

Contra, In *re Fleishman*, 9 A. B. R. 557, 120 Fed. 960 (D. C. Ills.): In this case discharge was refused because the bankrupt refused to surrender property that had been scheduled. Perhaps this decision could be brought under the rule that one in contempt of court may not be heard.

Inferentially, apparently contra, In *re Walther*, 2 A. B. R. 702, 95 Fed. 941 (D. C. N. Y.); apparently contra, In *re Steindler & Hahn*, 5 A. B. R. 63 (Ref. N. Y.); Impliedly, In *re Wolf*, 20 A. B. R. 304, 159 Fed. 299 (D. C. Pa.); In *re Glasberg*, 28 A. B. R. 826, 197 Fed. 896 (C. C. A. N. Y.); In *re J. B. Cason*, 27 A. B. R. 903, — Fed. — (D. C. Miss.); In *re Daugherty*, 26 A. B. R. 550, 189 Fed. 239 (D. C. Ky.); In *re Gara*, 26 A. B. R. 573, 190 Fed. 112 (D. C. Pa.).

of the application,' must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge to the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.

"When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of § 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise, the judge 'shall' discharge the applicant.

"The right to a discharge, and the effect of a discharge, are wholly distinct propositions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge."

[This case reverses *In re Marshall Paper Co.*, 2 A. B. R. 653, 102 Fed. 872, wherein the lower court had held: "The judge * * * is required to 'investigate the merits of the application' and hence is not confined to the consideration of those objections to the discharge which are properly set forth by the creditors."]

In *re Eades*, 16 A. B. R. 31, 143 Fed. 293 (C. C. A. Ills.): "Under § 14 * * * the bankrupt is entitled to a discharge, on due application, unless guilty of one of the offenses there specified, and the objector has the burden of proof upon such issue. The question whether the grounds for denying a discharge are wisely so limited cannot enter into consideration when an issue is raised, and the terms of the act are plain that the application is deniable only upon due proof of commission of one of these enumerated offenses."

In *re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.): "The bankrupt was entitled to his discharge, as a matter of right, unless debarred upon one of the statutory grounds specified by the creditor."

In *re Crist*, 9 A. B. R. 1, 116 Fed. 1007 (D. C. Ala.): "The court investigates the merits of the application, and will discharge the applicant, unless he has committed an offense punishable by imprisonment, as provided by the Bankrupt Act, or has concealed or failed to keep books, etc."

In *re Griffin Bros.*, 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.): "It is incumbent upon the creditor opposing a discharge to allege in his specifications and to prove to the court one of the statutory grounds for withholding the discharge. * * * The only grounds of objection to a discharge that can be interposed are those enumerated in §§ 14, 29, Bankr. Act."

In *re Hirsch*, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.): "It has been very earnestly and forcibly argued that § 7 of the Act of 1898 makes it the duty of the bankrupt to prepare, make oath to, and file in court a schedule of his property, the location thereof, and testimony of the value in detail, and that a failure to discharge this duty is of itself a sufficient ground for the court to deny the discharge. As already intimated, the statute does not present the grounds of opposition to a discharge in that way. It is specific and definite in prescribing that conduct of a bankrupt which shall defeat him of his discharge, and the courts can incorporate into the statute no other grounds of opposition. In-

deed, the general scheme of this act seems very narrowly to limit the grounds for withholding a discharge, and, on the other hand, to declare that it shall have no effect as against creditors who have certain rights and equities against the bankrupt as prescribed in the statute, some of which were, under former acts, prescribed as grounds for denying the discharge."

Thus, a merely preferential transfer by the bankrupt is insufficient to bar discharge.⁶² It is not an offense against the bankruptcy act that the bankrupt has violated a state law, hence it is not a ground for denial of discharge.⁶³ And a bankrupt will not be refused a discharge because of the fact that, more than a year before the bankruptcy, he committed larceny, or larceny as bailee, against the objecting creditor.⁶⁴ Nor will the fact that he was reckless, improvident and utterly incompetent to manage his business affairs prevent his discharge.⁶⁵

Nor is it a ground for refusing discharge that the petition in bankruptcy was filed by the bankrupt to defeat the collection of a just claim, even if a judgment claim.⁶⁶

Talcott v. Friend, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills., affirmed sub nom *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31): "In the absence of such showing, it was the duty of the court, under § 14 (b), to grant the discharge (confirm the composition)."

§ 2470. Though Bankrupt Owes Only Nondischargeable Debts; or Only Debt Scheduled Nondischargeable.—And such discharge is to be granted though the bankrupt owes debts that are not dischargeable.⁶⁷

Obiter, In re Carmichael, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa): " * * * if he had a judgment against the bankrupt for willful and malicious injury to his property, that fact would not defeat the granting of the discharge, but would only except the judgment from the effect of the discharge under the provision of § 17 of the act."

Or though the only claim scheduled, or proved, is an undischARGEABLE claim.⁶⁸

⁶². See post, § 2496. In re Maher, 16 A. B. R. 340, 144 Fed. 505 (D. C. Mass., affirming 15 A. B. R. 786); impliedly, In re Gaylord, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y., affirming 5 A. B. R. 410); In re Battle, 19 A. B. R. 40, 154 Fed. 741 (D. C. N. Car.); In re McLellan, 30 A. B. R. 325, 204 Fed. 482 (D. C. N. Y.); In re Doyle, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.); In re Bouck, 28 A. B. R. 378, 199 Fed. 453 (D. C. N. Y.); In re George Julius and Simon Julius, — A. B. R. —, — Fed. — (C. C. A. N. Y., reversing In re Julius Bros., 31 A. B. R. 132, 209 Fed. 371); reported in N. Y. Law Journal Sept. 15, 1914.

⁶³. In re McLellan, 30 A. B. R. 325, 204 Fed. 482 (D. C. N. Y.).

⁶⁴. In re Wolf, 20 A. B. R. 304, 159 Fed. 299 (D. C. Pa.).

⁶⁵. In re Boner, 22 A. B. R. 151, 169

Fed. 727 (D. C. Va.).

⁶⁶. In re Taylor, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.).

⁶⁷. In re Rhutassel, 2 A. B. R. 697, 96 Fed. 597 (D. C. Iowa); In re McCarty, 7 A. B. R. 40, 111 Fed. 151 (D. C. Ill.); *obiter*, In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Pa.); In re Liever, 3 A. B. R. 217 (Sp. Master, Pa.); In re Tinker, 3 A. B. R. 580, 99 Fed. 79 (D. C. N. Y.); in this case, however, the undischARGEABILITY was questioned. In re Peacock, 4 A. B. R. 136, 101 Fed. 560 (D. C. N. Car.); instance, In re Cotton and Preston (No. 1), 25 A. B. R. 517, 183 Fed. 181 (D. C. Ga.).

⁶⁸. In re McCarty, 7 A. B. R. 40, 111 Fed. 151 (D. C. Ills.): A judgment for seduction. Contra, In re Maples, 5 A. B. R. 426, 105 Fed. 919 (D. C. Mont.).

§ 2471. **Or Though Opposing Creditor's Debt Nondischargeable or One against Which No Exemption Exists.**—And the discharge is to be granted although the creditor opposing the discharge has an undischARGEABLE claim;⁶⁹ or one against which there are no exemptions.⁷⁰

§ 2472. **Or Though Only One Debt Exists.**—And that there is only one debt scheduled, is no bar to discharge.⁷¹

But it has been held that where the only claims against the bankrupt are disputed by him and not admitted to be debts, or where the only claim listed is not provable, the court is without jurisdiction to grant the discharge; the discharge authorized by the bankruptcy law being a discharge from debts which are provable, and not invalid claims or debts not provable.⁷²

§ 2473. **That Only Partnership Debts Exist, No Bar to Discharge in Individual Bankruptcy.**—And that the only debts of the bankrupt, in an individual bankruptcy, are partnership debts, is no bar to his discharge.⁷³ The partnership debts, moreover, are provable against the individual estate, though not entitled to dividends therefrom until individual creditors are paid.

§ 2474. **Intervening Insanity or Death, No Bar.**—Intervening insanity is not ground for refusing the discharge;⁷⁴ nor is intervening death, apparently.⁷⁵

§ 2475. **Undetermined Petition for Discharge in Pending Bankruptcy under Former Law of 1867, Not a Bar.**—An undetermined application for discharge in a still pending bankruptcy, under the old law of 1867, is no bar to a discharge under the present act.⁷⁶

§ 2476. **Whether Misconduct in Former Bankruptcy, Bar.**—It is a question whether misconduct of a bankrupt in a former bankruptcy is

69. *Obiter*, In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Pa.); *obiter*, In re Carmichael, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa).

70. In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Pa.).

71. In re Tinker, 3 A. B. R. 580, 99 Fed. 79 (D. C. N. Y.); In re Frank, 6 A. B. R. 156, — Fed. — (D. C. Pa.).

72. In re Gulick, 26 A. B. R. 632, 186 Fed. 350 (D. C. N. Y.); In re Yates, 8 A. B. R. 69, 114 Fed. 365 (D. C. Cal.); In re Maples, 5 A. B. R. 426, 105 Fed. 919 (D. C. Mont.).

73. *Contra*, In re Meyers, 2 A. B. R. 707, 96 Fed. 408 (D. C. N. Y.). Also *contra*, In re Meyers, 3 A. B. R. 260, 97 Fed. 757 (D. C. N. Y.). These two cases are wrong in principle. Even if it were correct to hold (and the holding is doubtful) that a discharge in an individual proceedings does not dis-

charge partnership obligations, yet it would be improper to refuse discharge on that ground although the only debts scheduled are firm debts. The bankrupt, unless he has done one of the things mentioned in the statute as barring discharge is entitled to his discharge for what it is worth and its effect is not to be determined in advance.

74. In re Miller, 13 A. B. R. 345, 133 Fed. 1017 (D. C. Pa.). See ante, § 98.

But a guardian ad litem should be appointed; In re Miller, 13 A. B. R. 345, 133 Fed. 1017; In re Burka, 5 A. B. R. 843, 167 Fed. 674 (D. C. Tenn.). See ante, § 98.

75. *Obiter*, In re Miller, 13 A. B. R. 345, 133 Fed. 1017 (D. C. Pa.). See ante, § 98.

76. In re Herrman, 4 A. B. R. 139, 102 Fed. 753 (D. C. N. Y.).

a bar.⁷⁷

§ 2477. Lack of Sufficient "Residence, Domicile or Principal Place of Business" in District, No Bar.—The objection that the bankrupt is a nonresident of the district, or does not have his principal place of business nor domicile there, will not be considered as a bar upon an application for discharge.⁷⁸

In *re Clisdell*, 4 A. B. R. 95, 101 Fed. 246 (D. C. N. Y., reversing 2 A. B. R. 424): "Whether or not the court was right in adjudicating *Clisdell* a bankrupt, is not now in issue. He has been adjudicated a bankrupt. The petition was insufficient on its face, and nothing appeared in that proceeding challenging the jurisdiction of the court. The opposing creditor appeared and filed his proof of claim and examined the bankrupt before the referee. Here then is a bankrupt duly adjudicated. His petition for a discharge is a separate and distinct proceeding. The court is familiar with no rule of law by which, in such circumstances as are here shown, objections disputing jurisdiction in the original proceeding can be thus determined collaterally. It is too late. Certainly there is no provision of the bankruptcy law which authorizes such a course. The petition for a discharge rests upon the fundamental proposition that the petitioner has been adjudicated a bankrupt, and the objections which may be interposed and litigated are those pointed out in §§ 14 and 29 of the act. It would involve the administration of the law in endless confusion if the issue of domicile can be raised in every matter growing out of, or ancillary to, the original bankruptcy proceedings."

§ 2478. Collateral Attack on Jurisdiction, for Lack of "Residence" or Capacity, etc.—If lack of residence, domicile, etc., appears affirmatively on the face of the record itself and not by mere omission, probably this defect is available on discharge as well as elsewhere, collaterally. Lack of sufficient residence, etc., being a question going to the very jurisdiction of the court over the subject, it would perhaps seem proper to raise it at any time and in any branch of the proceedings.⁷⁹

Being an attack on the adjudication, however, it should be direct and not collateral, unless the adjudication is void on its face.⁸⁰ And it would not be void on its face, probably, by mere omission of any allegation whatsoever on the subject, but only by affirmative facts appearing on the record practically denying residence, etc.⁸¹

⁷⁷. *Obiter*, In *re Feigenbaum*, 9 A. B. R. 597, 121 Fed. 69 (C. C. A. N. Y.). See "False Oath," §§ 2531, 2532. Compare ante, § 2439.

Laches of Creditor in Failing to Present Objections in Former Bankruptcy and in Failing to Prosecute Suit.—In *re Cason*, 27 A. B. R. 903 (Referee Miss., affirmed by the District Court).

⁷⁸. In *re Goodale*, 6 A. B. R. 493, 109 Fed. 783 (D. C. N. Y.). See ante, §§ 450, 1777½. Also, compare, In *re Wheeler*, 21 A. B. R. 262, 165 Fed. 188

(C. C. A. Ills.), wherein the court considered the facts and found in favor of the bankrupt but apparently treated the defense as valid in law.

⁷⁹. Compare, In *re Wheeler*, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.).

⁸⁰. But compare, In *re Wheeler*, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.).

⁸¹. See ante, § 450.

And it has been held that this objection can not be raised where the creditor has been guilty of laches. In *re Mason*, 3 A. B. R. 599, 99 Fed. 256

Nor may the adjudication be collaterally impeached on discharge on the ground of infancy or other lack of capacity.

§ 2479. Filing of Petition for Discharge after Expiration of Year.—That the petition for discharge was not filed until after the expiration of the year will not be considered on the hearing in opposition to a discharge, for it will be presumed to have been filed on leave granted and sufficient showing.⁸² However, if the record affirmatively shows it was not filed until after eighteen months, it may be attacked collaterally, as no showing can be presumed possible to validate such a belated petition.⁸³

§ 2480. Withholding Discharge or Dismissing Discharge Petition, for Other Causes—Noncompliance with Rules, Want of Prosecution, etc.—But the court may temporarily withhold the discharge and even dismiss the petition for discharge altogether for causes other than those mentioned in the statute as bars to discharge. Thus, it may withhold the discharge temporarily for noncompliance with the rules of court relative to the discharge, or to await the outcome of contempt proceedings against the bankrupt,⁸⁴ or it may dismiss the discharge petition altogether for want of prosecution or lack of jurisdiction.

The rule that the court "shall" grant the discharge unless one or more of the grounds expressly stated in the statute as bars of discharge exist, must be taken with necessary qualification. It assuredly does not mean that the bankrupt's application for discharge "shall" be granted, even where no statutory bar exists, if the petition itself is framed improperly or filed after the expiration of eighteen months, or if the rules of court have not been complied with, or if lack of jurisdiction exists. Notwithstanding none of the statutory grounds for barring a discharge be proved, nevertheless the court may, even upon its own motion, dismiss a petition for want of prosecution, or for lack of jurisdiction, or may temporarily withhold discharge until the orders of the court relating to the discharge have been complied with.

Thus, it has been previously noted in chapter 1 of this part that the petition for discharge may be dismissed for want of prosecution; and it has also previously been noted, in considering the subject of the adjudication, that for lack of jurisdiction the court may vacate the adjudication and dismiss the entire proceedings, which would, of course, include the dismissal of the petition for discharge. Failure to comply with the rules and orders of the court relative to the form of the petition for discharge and the requirements of the filing of it, without question would warrant the

(D. C. N. Car.); *In re Clisdell*, 4 A. B. R. 95, 101 Fed. 246 (D. C. N. Y.).

But laches could bar the right only where the defect does not affirmatively appear on the face of the record.

⁸² *In re Haynes & Son*, 10 A. B. R. 13, 122 Fed. 560 (D. C. Pa.).

⁸³ *In re Fahy*, 8 A. B. R. 354, 116 Fed. 239 (D. C. Iowa).

⁸⁴ *In re Kretsch*, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.).

temporary withholding of the discharge until compliance had been had therewith; and this was undoubtedly a proper exercise of power even before the amendment of 1903 added, as a bar to discharge, the refusal of the bankrupt to obey any lawful order of the court.⁸⁵

Strause v. Hooper, 5 A. B. R. 230, 105 Fed. 590 (D. C. N. Car.): "The objections to the discharge of the partnership of J. A. Hooper & Co., are not such as are contemplated in the act as grounds upon which a discharge may be refused. * * *

"The court will not seek for grounds upon which to refuse or even delay a discharge, but hear and consider them when properly presented. The court must, however, in every case look to see that the law and rules have been complied with. In the case at bar there is no evidence or certificate of conformity as required by District Rule 8; no proof of publication. The order for discharge is therefore postponed until the court is satisfied the law and rules have been complied with, and the bankrupts entitled to the discharge."

But much more, however, may not legally be done by the court; for no right otherwise exists for refusing a discharge, except upon the grounds mentioned in the statute.⁸⁶

^{85.} See post, §§ 2457, 2582.

^{86.} **Temporarily Holding Discharge in Abeyance, for "More Thorough Investigation."**—It has been held that the judge may temporarily hold the entire discharge matter in abeyance pending a more thorough investigation, although hearing has been had, if probable cause appears.

In *re Steed & Curtis*, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.): This decision lays down a rule that is liable to abuse. The better rule is that the opposing creditors should present their evidence in accordance with usual procedure and if they cannot then substantiate their allegations, with the requisite degree of certainty, the discharge must be granted and must not be delayed in order to furnish opportunity for them to make up for their dilatoriness or inability.

However, see further, along the same line as In *re Steed*, the case, In *re Walther*, 2 A. B. R. 702, 95 Fed. 941 (D. C. N. Y.): "It is the duty of the bankrupt to present an intelligent and true statement of her affairs, to show clearly what goods her husband left, what she added and commingled with the same, and the disposition made of each class of property, and thereupon to account for the property that should inure to the benefit of her creditors. The court will not permit her to plead ignorance, and assert that she acted through agents, and that all detailed knowledge rests with such agents, and that the court must look to such source for information. She, at a re-

cent time, had property. What has she done with it? If she can not, through herself or others, make the explanation, her discharge should be withheld." In *re Finkelstein*, 3 A. B. R. 800, 101 Fed. 418 (D. C. N. Y.).

Withholding Discharge until "Proper Accounting" Given by Bankrupt.—

And it has also been held that the judge may temporarily withhold discharge until the bankrupt gives proper accounting, although he pleads ignorance of details. In *re Walther*, 2 A. B. R. 709, 95 Fed. 941 (D. C. N. Y.); In *re Hyman*, 3 A. B. R. 169, 97 Fed. 195 (D. C. N. Y.); In *re Finkelstein*, 3 A. B. R. 800, 101 Fed. 418 (D. C. N. Y.).

Withholding Discharge for Correction of Mistakes as to Exemption.

—And that he may temporarily withhold discharge until mistakes in setting apart exemptions have been corrected, see In *re McBryde*, 3 A. B. R. 731, 99 Fed. 686 (D. C. N. Car.).

Withholding Discharge for Bankrupt's Contempt.—

And it has been held permissible to withhold the discharge temporarily to await the outcome of contempt proceedings pending against the bankrupt and, if he be found in contempt, until he shall have purged himself, In *re Kretsch*, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.).

Referee's Failure to Properly Publish Notice of First Meeting of Creditors No Ground.—Obiter, In *re Elkind & Schwartz*, 23 A. B. R. 166, 175 Fed. 64 (C. C. A. N. Y.).

Thus it has been held, under a local rule, that an application for discharge may be dismissed where the first meeting of creditors was not called, and the examination of the bankrupt completed, before the application was filed.⁸⁷

§ 2481. Buying Off Opposition to Discharge.—If the prosecution of opposition is bought off after specifications in opposition have been filed, the specifications will not be dismissed. Either the court will, if hearing has been had, proceed to final decree; or it will give opportunity to other creditors upon due notice, to take up the opposition.⁸⁸

This much ought to and can be done, otherwise collusive oppositions will be encouraged and the interests of the community in the just determination of the status of the debtor be prejudiced. Much more, however, cannot properly be done by the court.

Compare, *In re Dietz*, 3 A. B. R. 316, 97 Fed. 563 (D. C. N. Y.): "There is no doubt that if the opposition of the creditor is bought off through the procurement or privy of the bankrupt, it is such fraud upon the act as would warrant vacating the discharge, the fact itself being prima facie evidence that the bankrupt was not entitled to it. *Tuxbury v. Miller*, 18 Johns. 311; *In re Douglass* (D. C.) 11 Fed. 403, 406; *In re Palmer*, 14 N. B. R. 437, Fed. Cas. No. 10,678; *Balsdel v. Fowle*, 120 Mass. 447; *Bell v. Leggett*, 7 N. Y. 176. The general subject was very fully considered in the case last cited, and it was declared to be 'of no consequence that the arrangement was made between the creditors of the bankrupt and a third person without the intervention or knowledge of the bankrupt.'

"All such arrangements are to be condemned, as at variance with the policy of the Bankruptcy Acts, whether expressly prohibited by statute or not (*Smith v. Bromley*, 2 Doug. 696), and as injurious to all creditors, because calculated:

"To suppress inquiry and to protect fraud and concealment from successful disclosure and development, * * * and to give the bankrupt a benefit designed for the honest insolvent, and which the fraudulent debtor by sound justice and express provisions of the statute was prohibited from receiving.'

"In the case of *Ex parte Briggs*, 2 Low. 389, Fed. Cas. No. 1,868, where a

⁸⁷. *In re Wollowitz*, 27 A. B. R. 558, 192 Fed. 105 (C. C. A. N. Y.), rule of Southern District of New York.

⁸⁸. Compare, "Crimes against the Bankruptcy Act," ante, part IX.

Compare, *In re Sanborn*, 12 A. B. R. 428, 131 Fed. 397 (D. C. N. Y.): In this case the court in substance held that, where presumptively a discontinuance of the opposition to a bankrupt's discharge was secured because of some act, either by him or on his behalf and the referee refused the certificate of conformity required by Rule 10, the matter would be referred back for investigation, pending which the discharge would be withheld.

Compare, *In re Steindler & Hahn*, 5 A. B. R. 63 (Special Master). Compare, under law of 1867, *In re Doug-*

lass, 11 Fed. 403, 406. Also compare, under law of 1867, *In re Palmer*, 14 N. B. Reg. 437, Fed. Cases No. 10,678. But compare qualification of rule under law of 1867, *In re Briggs*, 2 Low. 389, Fed. Cases No. 1,868.

Creditors Whose Own Specifications Insufficient. Using Specifications of Creditors Who Fail to Appear.—Creditors whose own specifications have been insufficient may in the discretion of the court, be permitted to avail themselves of specifications filed by other creditors who have failed to appear to prove them. See ante, § 24C3¼.

Also, compare similar ruling in cases of composition. *In re Levy*, 22 A. B. R. 769, 172 Fed. 780 (D. C. Mass.).

surety of the bankrupt upon an attachment bond paid the debt to a creditor who was opposing the bankrupt's discharge on his own account and wholly without the bankrupt's knowledge or privity, it was held that the discharge was not vitiated. Judge Lowell, however, expressly avers that that was an exceptional case; and he adds:

"I do not intend to say that payment by a friend actually made in behalf of the debtor with his knowledge is not prohibited, nor that very slight evidence would not affect him with participation."

"It is not necessary for me to make any ruling in this case on the effect of a withdrawal of opposition procured without any actual or constructive knowledge or participation by the bankrupt. I am not satisfied that such was the present case. Though the verbal protestations are very strong to this effect, the circumstances all point to a contrary conclusion. Not indeed that the bankrupt personally was an active participant, for no doubt he was not; but his prior personal relations to Blumberg, as well as through his wife, the improbability that this sum of \$500 would have been advanced by him in the manner stated without the bankrupt's indirect privity, the fact that the money was lodged with a depository, to be turned over only after the discharge was granted, and the course of practice necessary to procure such a withdrawal and a discharge of the bankrupt through the bankrupt's attorney upon such a withdrawal, show that the transfer of these claims to Blumberg had nothing of the character of a mere purchase of them for what they might be worth, but was a very carefully planned and systematic means for procuring the withdrawal of the opposition and thereupon the bankrupt's discharge; and such a procedure could not well take place without the privity, concurrence and knowledge of the bankrupt's attorney, as to which nothing appears in the opposing affidavits." But this was a case of revocation, not refusal, of discharge, and revocation may be had for fraud alone.

And one court has held, obiter, that the discharge may be refused on the ground that opposition thereto was bought off.

In *re Luftig*, 15 A. B. R. 778, 162 Fed. 322 (D. C. Mass.): "I am unable to believe that the Act requires the court to grant a discharge, knowing at the time that facts exist which would thus render it revocable for fraud had they first come to light after it was granted, although no cause for refusing it under § 14b is shown. The facts proved in regard to the settlement of the Roseberg claim would therefore, in my opinion, justify me in refusing the discharge did the case present no other reasons for doing so, but other sufficient reasons appear, wholly independent of the settlement in question." [But the court fails to note that fraud alone is insufficient to obtain revocation of a discharge. It must also appear, in order to revoke, that, "The actual facts did not warrant the discharge." See § 15.]

And where the court is clearly of the opinion that the bankrupt is guilty of committing an act which would bar his discharge, the fact that the creditors who originally objected thereto have withdrawn should have no effect upon the court. Such fact is only to be taken into consideration when there is doubt in the mind of the court as to the bankrupt's guilt.⁸⁹

§ 2482. Discharge Not Refused for Acts Committed before Enactment of Law.—The Bankruptcy law is not retrospective nor retroac-

89. In *re Hammerstein*. 26 A. B. R. 757, 189 Fed. 37 (C. C. A. N. Y.).

tive, and acts of the bankrupt committed prior to the passage of the bankruptcy law, will not bar discharge.⁹⁰

Obiter, *In re Quackenbush*, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.): "If the fraudulent transfers complained of, occurring as they did long prior to the Act of 1898, had culminated at the time they were made, so that the bankrupt's interest in the property passed forever beyond his control and became vested legally and beneficially in the transferees, there can be no doubt that he would be entitled to his discharge, no matter how preferential and fraudulent the transfers may have been as to creditors at the time. In other words, a fraud committed prior to the law making it a crime cannot bar a discharge."

[1867] *In re Moore*, Fed. Cases 9,751: "The Bankrupt Law cannot be made to have a retroactive effect, and punish a party, by refusing him a discharge for acts committed by him prior to the passage of the law. A fraudulent preference or transfer of a debtor's property, by the act, is made an offense, for which the punishment prescribed by the act is a failure to obtain his discharge. To thus punish a party, the offense for which the punishment is inflicted must have been committed since the passage of, and in violation of, a law then in force."

[1867] *In re Hussman*, Fed. Cases 6951: "The withholding of a discharge from a bankrupt is in its nature a penalty for some improper conduct, and to refuse a discharge because of the improper conduct of the bankrupt, prior to the passage of the Bankrupt Act, would be to make the act retroactive."

[1867] *In re Keefer*, Fed. Cases 7636: "*In re Rosenfeld*, Cas. No. 12,058, Judge Field, of the District of New Jersey, held that in such case, the act, in order to constitute a bar to a discharge, must have been committed since the passage of the Bankrupt Act. I fully concur in the reasoning and conclusion in that case."

[1867] And compare, *In re Goodfellow*, Fed. Cas. 5536: "It has been argued in behalf of the bankrupt, that, granting the preferences to have been made, and to be within the period contemplated by the statute, still they were made while he was a resident of the province, not subject to our law and not contemplating bankruptcy under it, and that in such a case the law cannot affect him; and as it is not shown that the acts were illegal when and where they were done, they must be presumed to have been legal, and if so, they are good wherever they may be sought to be impeached. There is much force in this argument, and, indeed, it would be irresistible if the question were of the title to the goods or money conveyed in preference, or of any criminal responsibility; but the question here is, whether a person who applies to be discharged from his debts must not show that he has complied with the conditions imposed by law, even although he was not aware of them and was not subject to the law when he did the acts. Congress has an undoubted right to annex such

^{90.} *In re Neely*, 12 A. B. R. 409, 134 Fed. 667 (Ref. N. Y., affirmed by D. C.); *In re Lieber*, 3 A. B. R. 217 (Ref.): "This, however, was before the Amendment of 1903 removed the requirement that concealment, etc., of account books must be in contemplation of bankruptcy."

Compare, *In re Scott*, 11 A. B. R. 327, 126 Fed. 981 (D. C. Del.); *In re Webb*, 3 A. B. R. 386, 98 Fed. 414 (D. C. N. Y., affirming 3 A. B. R. 204);

In re Shorer, 2 A. B. R. 165, 96 Fed. 90 (D. C. Conn.): This, however, was before the Amendment of 1903 removed the requirement of "contemplation of bankruptcy" as to concealment of books of account, etc. [1867] *In re Rosenfeld*, Fed. Cases 12,058; [1867] *In re Hollenshade*, Fed. Cases 6,610; [1867] *In re Delevan*, Fed. Cases 3,758; [1867] but compare, *In re Cretiew*, Fed. Cases No. 3,390.

conditions as it chooses to the grant of a discharge. It might enact, for instance, that certain things done before the passage of the act should be ground for refusing it. And this seems to me an analogous case. The statute says: 'You shall not be released if you have given certain preferences.' Now, preferences are not necessarily illegal; they are the payment of just debts. It depends altogether upon the fact of subsequent bankruptcy within a certain time whether they turn out to be legal or not. The fact that the transaction is legitimate between the parties and even against all the world is not important, if the intent existed in the mind of the debtor. The act requires an equal distribution of the estate, and if this fails through the act of the debtor, as, for instance, if he has lost a part of it in gaming, the discharge is not granted. It is not a punishment; it is not retroactive. It is simply a condition precedent. * * * If the estate of the debtor has been disposed of in accordance with the Statute, a discharge shall be granted; otherwise not."

[1867] And compare, *In re Seeley*, Fed. Cas. 12,628: "Again, counsel for the bankrupt argued that the jury ought to pass upon the question of intent in every case, as the acts mentioned in § 5110 are in the nature of offenses or forfeitures of a right the bankrupt has to his discharge, and the proceeding is therefore quasi criminal. Support for this position is found in an incidental remark of Judge Field in the case of *In re Rosenfeld* (supra). It is clear, however, that a man has no moral or legal right to be released of his debts, except by virtue of some statute, and that, in the enactment of such statute, Congress has the power to impose such conditions as it pleases to the granting of a discharge. It has, indeed, refused it altogether in voluntary cases, except by consent of a certain proportion of creditors. I am better pleased with those opinions which treat the discharge as a favor, and the commission of one of the acts specified, as the violation of a condition precedent. Such was the position of Judge Hall in *re Cretiew*, Fed. Cas. No. 3,390, and of Judge Lowell in *re Goodfellow*, Fed. Cas. No. 5,536."

But this means that the *ultimate* act forbidden must not have been committed before the passage of the law, and does not mean that all the evidentiary facts to be proved in order to show the bankrupt guilty of doing the forbidden act in question must have occurred since the passage of the bankruptcy law. Thus, if the bankrupt has perpetrated a fraudulent conveyance before the passage of the Bankruptcy Act, such conveyance is still voidable at the suit of creditors; and therefore, if, knowingly and fraudulently, he fails to reveal the recoverable title to his trustee, when called upon in his examination or schedules to do so, he is guilty of the act of concealing assets *subsequent* to the passage of the bankruptcy law, although the facts making the conveyance fraudulent occurred before the passage of the bankruptcy law.⁹¹

United States v. Cohn, 15 A. B. R. 357, 142 Fed. 983 (D. C. N. Y.): "This provision of the Bankrupt Act does not make any act of the bankrupt before the bankruptcy criminal. But if a bankrupt, before the bankruptcy, has concealed his property, and, after his trustee is appointed, continues to conceal it from the trustee, he is criminally liable under this section, and, if indicted for such crime, evidence of his acts of concealment before the bankruptcy, as well as those subsequent thereto, would undoubtedly be admissible as a part of the *res gestæ*.

91. *In re Quackenbush*, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.).

A conspiracy to commit a crime always, in the nature of the case, precedes the commission of the crime; and, in my opinion, it does not follow, because, at the time that a conspiracy is entered into to conceal property from a trustee, no trustee has been appointed and no proceedings in bankruptcy begun, that, therefore, the crime of conspiracy under § 5440 cannot have occurred."

In *re Scott*, 11 A. B. R. 331, 126 Fed. 981 (D. C. Del.): "A statute is not necessarily retroactive or retrospective because its operation in a given case may be dependent upon an occurrence anterior to its passage, or, in the language of Endlich, 'because a part of the requisites for its action is drawn from a time antecedent to its passing.'"

Likewise, continuing concealment of books of accounts may be perpetrated by failure, after bankruptcy, to reveal their known whereabouts, although the original concealment was done before the passage of the Bankruptcy Act.⁹² Likewise, continuing failure to keep books of accounts with intent to conceal financial condition may be perpetrated by intentionally continuing a defective and wholly insufficient method of keeping books, begun before the passage of the Bankrupt Act.⁹³

§ 2483. Right to Discharge Governed by Law as It Stood at Time of Filing Bankruptcy Petition.—The right to a discharge is governed by the law as it stood at the time of the filing of the bankruptcy petition; for the regulation of conditions on which discharges are granted is a purely remedial matter.⁹⁴

§ 2484. Fraudulent Acts of Agents and Partners Not Imputable unless Actual Knowledge Exists, Where Commission of "Offense" Is Ground Urged.—Where the ground charged is the commission of one of the offenses punishable by imprisonment, the fraudulent conduct or concealment perpetrated by a partner or by an agent or manager of business for the bankrupt, will not be imputed to the individual bankrupt, without showing his knowledge thereof and participation therein.⁹⁵

Obiter, In *re Meyers*, 5 A. B. R. 4, 105 Fed. 353 (D. C. N. Y.): "* * * if the question were before me de novo, I should be inclined to consider, as no offense' or penal element exists in the requirements of this subdivision, that the principal is responsible, as respects a discharge in bankruptcy, for the fraudulent conduct of the agent to whom the whole business has been committed,

⁹². In *re Kamsler*, 2 N. B. N. & R. 97 (Ref. N. Y.).

⁹³. In *re Feldstein*, 8 A. B. R. 160, 115 Fed. 259 (C. C. A. N. Y.).

⁹⁴. In *re Peterson*, 10 A. B. R. 353, 122 Fed. 101 (D. C. Minn.).

⁹⁵. Compare, apparently contra, although distinguishable, In *re Hardie & Co.*, 16 A. B. R. 313, 143 Fed. 421 (D. C. Tex.). Compare, In *re Currie*, 23 A. B. R. 539 (Ref. Mich.), quoted at § 2485; compare, a fortiori, *Peck v. Lowenbein*, 24 A. B. R. 138, 178 Fed.

178 (C. C. A. N. Car.), quoted at § 2560. See post, § 2563.

For corresponding proposition, relative to acts of bankruptcy, see ante, § 171.

A man must be presumed to intend the natural consequences of his act. In *re Currie*, 23 A. B. R. 539 (Ref. Mich.).

Custom or Usage Contrary to Law, Not Valid.—No custom or usage is valid which is contrary to law, whether the same be statute law or common law. *Ibid.*

as in civil cases generally, where the fraud has been committed for the principal's benefit. But as that point seems to have been involved in the case last cited and a contrary decision was then made by Judge Thomas, sitting in this district, it will be followed until otherwise ruled upon appeal."

In re Hyman, 3 A. B. R. 169, 97 Fed. 195 (D. C. N. Y.): "Fraudulent intent is a personal quality, and, although it existed in the mind of the husband, it may not, for that reason be imputed to the wife."

In re Schultz, 6 A. B. R. 92, 109 Fed. 264 (D. C. N. Y.): "If in any case fraud can be similarly imputed to an innocent partner on account of the fraud of his copartner or other agent as respects the false or improper keeping of books of account (see In re Meyers, 5 Am. B. R. 4, 105 Fed. 353, 354), it can only be in cases where the fraudulent entries or omissions have reference to partnership transactions so as to fall within the general scope of the partner's or agent's authority."

"The frauds in the bookkeeping in this case related to transactions of a wholly different character, in which the partner was defrauding his copartner, as well as his creditors, in reference to transactions wholly outside the partnership authority."

Contra, obiter, In re Berry, 15 A. B. R. 360, 146 Fed. 623 (D. C. N. Y.): "The ground upon which the referee has granted the discharge, that the stock was pledged by employees of the bankrupts, and not by the bankrupts themselves, and that therefore the bankrupts had no intent in the matter, and therefore are not barred from a discharge by such act, seems to me untenable. The employees who pledged this stock were given complete control of the business of borrowing money for the firm on securities. If such employees, having such general authority, had in fact transferred the bankrupts' property, with intent to defraud the bankrupts' creditors, I think that the bankrupts' discharge would have been barred."

§ 2485. How, Where Ground Charged Is Not Commission of "Offense."—On principle it might seem that perhaps the same rule would not apply where the ground charged is not the commission of a punishable offense; and that perhaps in such cases the act of the partner or other agent might be imputed.⁹⁶

Obiter, In re Meyers, 5 A. B. R. 4, 105 Fed. 354 (D. C. N. Y.): "As respects the destruction or concealment of books of account, 'with fraudulent intent to conceal the true financial condition and in contemplation of bankruptcy' * * * if the question were before me de novo, I should be inclined to consider, as no 'offense' or penal element exists in the requirements of this subdivision, that the principal is responsible, as respects a discharge in bankruptcy, for the fraudulent conduct of the agent to whom the whole business has been entrusted, as in civil cases generally, where the fraud has been committed for the principal's benefit."

But such are not the holdings with respect to the failure to keep proper

⁹⁶ In re Hardie & Co., 16 A. B. R. 313, 143 Fed. 421 (D. C. Tex.). Also, apparently contra instance, holding to rule of preceding paragraph, In re Garrison, 17 A. B. R. 833, 149 Fed. 178 (C. C. A. N. Y.). In re Schultz, 6 A. B. R. 92, 109 Fed. 264 (D. C. N.

Y.); inferentially contra, obiter, In re Schachter, 22 A. B. R. 389, 170 Fed. 683 (D. C. N. Y.). Compare, apparently contra, Peck v. Lowenhein, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.), quoted at § 2560. See post, § 2563.

books of account, by a bookkeeper or other agent,⁹⁷ nor by a partner.

Apparently contra, *In re Hyman*, 3 A. B. R. 169, 97 Fed. 195 (D. C. N. Y.): "She cannot be deemed * * * to have been guilty of fraud in keeping her books for the single and only reason that her husband and agent was guilty in such direction. Negligence—at least negligence of the degree here involved—is not the equivalent of fraud, within the meaning of the statute."

Nor are such the holdings with respect to obtaining property on a materially false statement in writing, either in cases where such false statements are made by bookkeepers,⁹⁸ or by partners.⁹⁹

Compare, *In re Currie*, 23 A. B. R. 539 (Ref. Mich.): "An active partner must be held responsible for the act of his partner, of which he has no knowledge, unless he has affirmatively shown his innocence or ignorance of the wrongdoing of his fellow."

§ 2486. Whether Act Must Be Committed in Same Capacity in Which Discharge Sought, to Bar.—It is a question whether the act urged as ground for refusing discharge must have been done by the person seeking discharge in the same capacity in which he is seeking discharge. On principle it would seem that it must have been done in the same capacity.¹

SUBDIVISION "A."

CONCEALMENT OF ASSETS AS BAR TO DISCHARGE.

§ 2487. "Concealment of Assets," as Bar to Discharge.—Taking up the original grounds of opposition to discharge, the first ground reached is "Concealment of Assets."

If a bankrupt knowingly and fraudulently, whilst a bankrupt or after his discharge, conceals from his trustee any of the property belonging to his estate in bankruptcy, his discharge will be refused.²

^{97.} Where false statement of bankrupt's son who was running the bankrupt's store was held to bind the bankrupt. *In re Reed*, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

^{98.} *Gilpin v. Natl. Bank*, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa., reversing *In re Gilpin*, 20 A. B. R. 374), quoted at § 2560.

Compare, where facts showed employer had, or should have had, knowledge, *In re Savarese*, 31 A. B. R. 758, 209 Fed. 830 (C. C. A. N. Y.).

But see contra, where mother was held bound by false statements made by her son whilst running her business, though she herself was in entire ignorance thereof, *In re Reed*, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

^{99.} *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex., reversing *In re Hardie & Co.*, 16 A. B. R. 313, 143 Fed. 421).

^{1.} But compare, inferentially. *In re Hamilton*, 13 A. B. R. 333, 133 Fed.

823 (D. C. N. Y.), where a partner's individual discharge was being opposed for acts done as partner. And compare, *In re Currie*, 23 A. B. R. 539 (Ref. Mich.), quoted at § 2485.

For corresponding proposition relative to acts of bankruptcy, see ante § 171.

^{2.} Bankr. Act, §§ 14 (b) and 29 (b) (1); *In re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.). See instructive charge to jury in *U. S. v. Levinson & Kornblut*, 13 A. B. R. 32 (D. C. S. C.).

In re James, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C.); *In re Krall*, 28 A. B. R. 452, 196 Fed. 402 (D. C. Conn.); *In re Magen Bros. Co.*, 27 A. B. R. 729, 192 Fed. 883 (C. C. A. Pa.); *Pirvitz v. Pithan*, 27 A. B. R. 621, 194 Fed. 403 (C. C. A. Iowa); *In re Hirschowitz*, 27 A. B. R. 701, 194 Fed. 562 (D. C. Pa.); *In re Graves*, 26 A. B. R. 633, 189 Fed. 847 (D. C. Pa.); *In re Cantor*, 26 A. B. R. 859, (Sp. M. N.

§ 2488. "**Knowingly and Fraudulently.**"—The concealment must have been done "knowingly and fraudulently."³ That is to say, the concealment must have been known to the bankrupt and have been of such nature as would be calculated to affect creditor's rights disadvantageously, in some way.

§ 2489. **Intent to Conceal, Most Important Element.**—Intent to conceal is the most important element in the charge of concealment of assets;⁴ although it is not the sole element.⁵

§ 2490. **Honest Mistake, Even Mistake of Law, Excuses.**—An honest mistake, even perhaps a mistake of law will excuse.⁶

In re Morrow, 3 A. B. R. 264, 97 Fed. 574 (D. C. Calif.): "If this was her honest belief, even though it should be conceded that at the time of filing her petition in bankruptcy she had an interest in other property, the court would not be warranted in finding that she omitted to include such property in her schedule of assets for the purpose of concealing the same from the trustee in bankruptcy, or with the intention of defrauding her creditors; and the omission to include property in the schedule of assets filed by a bankrupt, when such omission was due to a mistake either of law or fact, is not an offense under subdivision 'b' of § 29 of the Bankruptcy Act, and is not ground for withholding a discharge."

And if the proof shows that the omission of property from the schedules can be satisfactorily explained by circumstances consistent with honest belief by the bankrupt that the omitted property did not belong to him, or that it was absolutely valueless, or that it had been practically abandoned by him, then the omission of this property from the schedules is no ground for refusing discharge.⁷

Acts done in reliance upon an erroneous decision of a lower court and before its reversal, are excusable. Thus, where a referee had erroneously held that commissions of a bankrupt life insurance agent on renewal pre-

Y.); In re James, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. Car.), affirmed sub nom. *James v. Stone*, 24 A. B. R. 288, 181 Fed. 1021 (C. C. A.); *James v. Stone*, 24 A. B. R. 288, 181 Fed. 1021 (C. C. A. N. Car.), affirming In re James, 23 A. B. R. 703, 175 Fed. 894).

3. Bankr. Act, § 29 (b) (1). In re Cohn, 1 A. B. R. 655 (Ref. Mo.); In re Mudd, 5 A. B. R. 244, 105 Fed. 348 (D. C. Mo.); In re Crenshaw, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.); In re Freund, 3 A. B. R. 418, 98 Fed. 81 (D. C. N. Y.); In re Froeder, 17 A. B. R. 73, 150 Fed. 710 (C. C. A. Mass.); In re Griffin Bros., 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.); *Klein v. Powell*, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.), quoted at § 2639; In re Hennebry, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa); In re Bacon, 30 A. B. R. 585, 205 Fed. 545 (D. C. N. Y.).

4. In re Schreck, 1 A. B. R. 366 (Pef. N. Y.); In re Crenshaw, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.); impliedly, In re Freund, 3 A. B. R. 418, 98 Fed. 81 (D. C. N. Y.); impliedly, In re Schofield, 17 A. B. R. 916, 15 A. B. R. 824 (D. C. Pa.); obiter, In re Jacobson & Son Co., 28 A. B. R. 492, 196 Fed. 949 (C. C. A. N. J.), set out fully at § 2387.

5. *Vehon v. Ullman*, 17 A. B. R. 437 (C. C. A. Ills.).

6. Obiter and inferentially, In re Wood, 3 A. B. R. 572, 98 Fed. 972 (D. C. N. Y.); instance, In re Schofield, 17 A. B. R. 918, 15 A. B. R. 824 (D. C. Pa.); [1867] In re Parker, Fed. Cases No. 10,720.

7. In re Hirsch, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.); impliedly, In re Alleman, 20 A. B. R. 745, 162 Fed. 693 (D. C. Pa.).

miums accruing after bankruptcy but earned on policies written beforehand did not pass to the trustee, the collecting of commissions by the agent after the referee's decision and before its reversal is insufficient.⁸

§ 2491. Advice of Counsel May Negative Intent.—Advice of counsel, if asked for and acted on bona fide, is valid evidence to negative fraudulent intent and knowledge on the bankrupt's part in omitting assets from the schedules or otherwise not revealing them.⁹

In re Berner, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.): "Advice of counsel is admissible in evidence as tending to rebut an inference of fraudulent intent, but only when some substantial question of law is involved; and its effect may itself be neutralized by facts tending to show the existence of a fraudulent intent notwithstanding."

§ 2492. But Insufficient, Where Legal Questions Are Matters of Common Knowledge: or Facts Not Fully Laid before Counsel, or Unwarranted Inferences Drawn from Advice.—But advice of counsel will not excuse an omission of assets from the schedules where there were no substantial legal questions involved, and the actual legal relation of the property to the bankrupt's estate was matter of common knowledge and plain to everybody.¹⁰ Nor will it excuse where the facts were not fully laid before counsel.¹¹

In re Remmers (Remmers v. Merchants' Laclede Nat. Bank), 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.): "Finally, it is contended by appellant that his failure to schedule the shares in question and set forth fully and truthfully his interest therein was due to the advice of his counsel. This contention we dismiss from further consideration, for the reason we are not convinced from a reading of the record that appellant fully and frankly disclosed the facts within his knowledge relating to these shares to his counsel at the time or before his schedules were prepared and verified, and received and acted on his opinion as

8. [Revocation of Discharge] In re Wright, 24 A. B. R. 437, 177 Fed. 578 (D. C. N. Y.), quoted at § 2813.

9. Compare similar proposition relative to "False Oath as Bar to Discharge," subdivision "B," § 2523, and cases there cited. Compare, also, advice of counsel as palliation of contempt, ante, § 2333. In re Schreck, 1 A. B. R. 366 (Ref. N. Y.); obiter, McNiel v. U. S., 18 A. B. R. 21, 150 Fed. 82 (C. C. A. Tex.); In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (Ref. Tenn.); inferentially, Woods v. Little, 13 A. B. R. 742, 134 Fed. 229 (C. C. A. Pa.); instance, In re Hansen, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.); instance, In re Schofield, 17 A. B. R. 918, 15 A. B. R. 824 (D. C. Pa.); In re Alleman, 20 A. B. R. 745, 162 Fed. 693 (D. C. Pa.); In re Kyte, 23 A. B. R. 414 174 Fed. 867 (D. C. Pa.); Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C.

A. Pa.); In re Cuthbertson, 29 A. B. R. 823, 202 Fed. 266 (D. C. S. D.).

Requisites, in General, of Advice of Counsel as Defense.—Compare as to requisites for validity of defense of advice of counsel, in general, In re Watts, 10 A. B. R. 128, 190 U. S. 1. Compare, U. S. v. Goldstein, 12 A. B. R. 755, 132 Fed. 789 (D. C. Va.).

10. In re Berner, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.); inferentially, In re Schreck, 1 A. B. R. 366 (Ref. N. Y.).

Instance of refusal, notwithstanding advice, In re Stoddard, 7 A. B. R. 762, 114 Fed. 486 (D. C. Wash.).

Instance of refusal, notwithstanding advice, In re Breitling, 13 A. B. R. 126, 133 Fed. 146 (C. C. A. Ills.).

11. In re Berner, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.); In re Breitling, 13 A. B. R. 126, 133 Fed. 146 (C. C. A. Ills.).

a matter of law, as must be done before the advice of counsel may be pleaded in justification or excuse of the charge made."

Nor where the advice given did not warrant the acts complained of.¹²

§ 2493. Because Property Claimable as Exempt, Fraudulent Intent Not Necessarily Negated.—Fraudulent intent is not necessarily negated by the fact that the property involved might have been claimed as exempt anyway.¹³

§ 2494. But Such Fact of Weight as Evidence.—But such fact is entitled to weight in determining intent.¹⁴

§ 2495. Willful Undervaluing of Scheduled Assets Whether Concealment.—Mere undervaluing of scheduled assets is not, per se, a concealment, but it is evidence to be taken into account in arriving at the intent.¹⁵

Analogously (false oath), *In re Semmel*, 9 A. B. R. 351, 118 Fed. 487 (D. C. Pa.): "A willful undervaluation covered up in the way this is, I cannot but regard as a false representation by the bankrupt with regard to his property, and being sworn to by him in verifying his schedules, it amounts to a false oath which bars a discharge."

§ 2496. Preference Not Amounting to Fraudulent Concealment, No Bar.—A preference not amounting to a fraudulent concealment is not ground for refusing discharge.¹⁶

§ 2497. Concealment Must Be "While a Bankrupt" or after Discharge.—The concealment, in order to effect a bar of the discharge, must have been perpetrated while the debtor was a bankrupt, or after his discharge.¹⁷

¹² *McNiel v. U. S.*, 18 A. B. R. 21, 150 Fed. 82 (C. C. A. Tex.).

¹³ Inferentially, *In re Breitling*, 13 A. B. R. 126, 133 Fed. 146 (C. C. A. Ills.); *In re Royal*, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.). Compare, to same effect, *In re Conroy*, 14 A. B. R. 250, 134 Fed. 764 (D. C. Penn.). Compare, to same effect, post, § 2539, under subject of "False Oath." Also, see § 2547.

¹⁴ *In re Todd*, 7 A. B. R. 770, 112 Fed. 315 (D. C. Vt.). Compare analogous proposition under "False Oath," post, § 2539.

¹⁵ *In re Hennebry*, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa).

¹⁶ See ante, § 2469. *In re Maher*, 16 A. B. R. 340, 144 Fed. 505 (D. C. Mass., affirming 15 A. B. R. 787); *In re Pierce*, 4 A. B. R. 554, 103 Fed. 64 (D. C. N. Y.); *In re Battle*, 19 A. B. R. 40, 154 Fed. 741 (D. C. N. Car.); *In re McLellan*, 30 A. B. R. 325, 204

Fed. 482 (D. C. N. Y.); *In re Marcus*, 30 A. B. R. 176, 203 Fed. 29 (C. C. A. N. Y.); instance, transfer to wife, *In re Doyle*, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.); *In re Mintzer*, 28 A. B. R. 743, 197 Fed. 647 (D. C. N. Y.); *In re Bouck*, 28 A. B. R. 378, 199 Fed. 453 (D. C. N. Y.). Compare, § 2553½. *In re Fiedrich*, 28 A. B. R. 656, 199 Fed. 193 (D. C. Minn.); *In re George Julius and Simon Julius*, — A. B. R. — Fed — (C. C. A. N. Y., reversing *In re Julius Bros.*, 31 A. B. R. 132, 209 Fed. 371), reported in N. Y. Law Journal, Sept. 15, 1914.

¹⁷ Bankr. Act, § 29 (b) (1). *In re Webb*, 3 A. B. R. 386, 96 Fed. 404 (D. C. N. Y., affirming 3 A. B. R. 204); *In re Quakenbush*, 4 A. B. R. 295, 102 Fed. 282 (D. C. N. Y.).

Impliedly, *In re Blalock*, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.): In this case a false oath made in a bankruptcy proceeding brought against another

§ 2498. **Continuing Concealments.**—But there may be a continuing concealment, after one has become a bankrupt, by false statements, and even, in some cases, by silence or omission to reveal when the duty exists to reveal, although the initial fraud or secreting occurred before bankruptcy.¹⁸

United States v. Cohn, 15 A. B. R. 359, 142 Fed. 983 (D. C. N. Y.): "This provision (§ 29 (b)) of the Bankrupt Act does not make any act of the bankrupt before the bankruptcy criminal. But if a bankrupt, before the bankruptcy, has concealed his property, and, after his trustee is appointed, continues to conceal it from the trustee, he is criminally liable under this section, and, if indicted for such crime, evidence of his acts of concealment before the bankruptcy, as well as those subsequent thereto, would undoubtedly be admissible as part of the *res gestæ*."

Cohen v. United States, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y., affirming *United States v. Cohen*, 15 A. B. R. 359, 142 Fed. 983): "It is true that it charges the removal and concealment of certain property before the appointment of a trustee, but it further alleges that a trustee was subsequently appointed and that the property was never turned over to him, but was concealed from him by the procurement of defendant Simpson with the knowledge, consent and connivance of the other conspirators. The case presented by the indictment is therefore one of continued concealment, and we are not called upon to consider whether there is an omission in the Bankrupt Law in respect of the disposition of property in contemplation of bankruptcy. If a bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment he violates the Bankruptcy Act, and a conspiracy that he shall do so violates the conspiracy statute."

In *re Jacobs & Verstanding*, 17 A. B. R. 470, 147 Fed. 797 (D. C. Ore.): "The word 'concealed' employed in this connection is sufficiently elastic in its signification to comprise 'continuing concealments.' Thus, if a bankrupt has disposed of property belonging to him, prior to the adjudication, and has the proceeds thereof in his possession or within his authority to use and appropriate subsequently, there is a continuing concealment, for which he is amenable to the law, although the fact of concealment by intent and purpose took place while he was not a bankrupt."

Indeed, concealment is rather a continuing state; and it does not con-

person was sought to be used as a bar to discharge.

In *re Mudd*, 5 A. B. R. 244, 105 Fed. 348 (D. C. Mo.).

When Ceases to Be a "Bankrupt."—As to when the bankrupt ceases to be "a bankrupt," see §§ 453, 473.

Proof of Adjudication of Bankruptcy Requisite.—It is essential that proof be made of the adjudication of bankruptcy. *Gilbertson v. United States*, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.).

No Collateral Attack on Adjudication.—And no collateral attack will be permitted on the order of adjudication. *Gilbertson v. United States*, 22 A. B. R. 32, 168 Fed. 672 (C. C. A.

Wis.); *Edelstein v. United States*, 17 A. B. R. 640, 149 Fed. 636 (C. C. A. Minn.). See also, ante, § 450, and § 2478.

18. See post, § 2511. Compare, ante, as to acts of bankruptcy, § 183. *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.), quoted at § 2320½; *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); In *re McCann Bros.*, 22 A. B. R. 557, 171 Fed. 266 (D. C. Pa.). See also, as to "Crimes," §§ 2328¾, 2320½. Compare, In *re Hennebry*, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa). Obiter, In *re Wakefield*, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.).

sist of one act.¹⁹

In *re James*, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C., affirmed sub nom. *James v. Stone*, 24 A. B. R. 288, 181 Fed. 1021, C. C. A.): "It is manifest that, if an article be concealed, put in a secret or hiding place, and so remains until it is discovered, it continues until such time in a state of concealment, or is during the entire period concealed. It is insisted by counsel for petitioner that, while this is true, the active agency of the person concealing the property is completed when it is concealed, or placed in concealment. Is the term 'has concealed,' as used in the statute, to be given this restricted meaning? Was it so used by the Legislature? The exact question has not, so far as an investigation has gone, been decided. * * * While not strictly in point, these expressions clearly recognize that the word 'concealed' has sufficient elasticity to comprise a 'continuous concealment.'" This case is quoted further at § 2555½.

A concealment, where the initial acts occurred before the bankruptcy—a "continuing concealment"—may properly be charged as of any date after the trustee's appointment that the duty rested on the bankrupt to reveal the whereabouts of the property by some overt act, as by scheduling it or by answering a question relative to it, or as of any date that, its possession not being conceded, the trustee demands it and it is not forthcoming.²⁰

§ 2499. Concealment Must Be Concealment from Trustee.—The concealment must have been concealment from the trustee.²¹

§ 2500. Concealment before Appointment of Trustee, Insufficient.—Concealment before the appointment of a trustee is ineffectual to bar discharge.²²

And, if no trustee be appointed at all, this ground of opposition will not lie.²³

19. *Johnson v. United States*, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.), quoted at § 2323; *James v. Stone*, 24 A. B. R. 288, 181 Fed. 1021 (C. C. A. N. Car., affirming *In re James*, 23 A. B. R. 703, 175 Fed. 894).

20. Compare partly to this general effect, *U. S. v. Stern*, 26 A. B. R. 110, 186 Fed. 854 (D. C. Pa.) quoted at § 2319.

Where Assets Disposed of before Trustee Appointed.—Compare *U. S. v. Stern*, 26 A. B. R. 110, 186 Fed. 854 (D. C. Pa.).

It would seem, where the specific assets were disposed of before the trustee was appointed that there might still be a concealment of them if still recoverable by the trustee, and their whereabouts, or facts relative to the transaction, are withheld on demand; and, at any rate, there might be concealment of their "proceeds."

21. Bankr. Act, § 29 (b) (1). In *re Quackenbush*, 4 A. B. R. 295, 102 Fed. 282 (D. C. N. Y.); In *re Mudd*, 5 A. B. R. 244, 105 Fed. 348 (D. C. Mo.).

22. Inferentially, contra, if after adjudication, *U. S. v. Goldstein*, 12 A. B. R. 755, 132 Fed. 789 (D. C. Va.). Compare *U. S. v. Levinson & Kornblut*, 13 A. B. R. 32 (D. C. S. C.); compare, *U. S. v. Cohn*, 15 A. B. R. 337, 142 Fed. 983 (D. C. N. Y.); compare, also, *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (D. C. N. Y.), quoted supra.

23. But compare, as to title to concealed assets under such circumstances, *Rand v. Iowa Central Ry. Co.*, 12 A. B. R. 164 (Sup. Ct. N. Y. App. Div.). And compare as to title of concealed assets after estate closed, *Fowler v. Jenks*, 11 A. B. R. 255 (Sup. Ct. Minn.).

In *re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.): "Before this offense can be committed there must be a trustee, and nowhere is it made an offense, or a ground of refusing a discharge, not to disclose in the schedules, or even on oath, the existence of property or of a debt owing to the bankrupt. If in the schedules, or in making oath thereto, or on an examination, the bankrupt commits perjury, then he has 'made a false oath' in or in relation to a proceeding in bankruptcy, and the making of such false oath is made a ground of refusing a discharge. Such false oath may consist in giving evidence which in effect amounts to a concealment, etc."

In *re Toothaker Bros.*, 12 A. B. R. 100, 128 Fed. 187 (D. C. Conn.): "There appearing to be no assets a trustee was not appointed. * * * by omitting to place it in the schedules, he was enabled to escape a trustee from whom to conceal it."

But a concealment begun before the appointment and continued thereafter becomes a concealment from the trustee.²⁴

§ 2501. Mere Inability to Account Reasonably for Assets Not Per Se Proof, Though Strong Evidence.—Mere inability to account reasonably for assets in the bankrupt's possession shortly before bankruptcy is not per se proof of concealment.²⁵ But it is strong evidence to prove concealment; ²⁶ and throws the burden of proof on the bankrupt.²⁷

§ 2501½. Presumption of Continued Possession When Property Once Traced and Shortage Unexplained.—If it is proved that the bankrupt recently had possession, then the presumption that he still has it will follow, unless he reasonably accounts for the disposition or disappearance of the assets.²⁸

Seigel v. Cartel, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa): "The evidence clearly enough shows that this merchant, between the 1st day of January, 1904, and August of that year, just preceding the proceeding in bankruptcy, disposed of between eleven and thirteen thousand dollars worth of goods. In other words, he was short that amount of stock at the time of the declared bankruptcy. He was called upon by the referee to account for these goods or their proceeds; the presumption being, as they were not on hand, that he had disposed of them and the proceeds were in his possession. * * * Not having scheduled or surrendered the property to the trustee, the concealment of the proceeds, within the provisions of the statute, is presumed."

²⁴. See §§ 2498, 2328¼; also, *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.); also, see *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.), quoted at § 2320½; *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

²⁵. In *re Idzall*, 2 A. B. R. 741, 96 Fed. 314 (D. C. Iowa); In *re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.).

²⁶. See cases on the proposition of summary orders on bankrupts, ante, §

1842, et seq. *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa). See especially, § 1850. Also, compare, § 2649.

²⁷. In *re Finkelstein*, 3 A. B. R. 800, 101 Fed. 418 (D. C. N. Y.); In *re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.); In *re Cantor*, 26 A. B. R. 859 (Sp. M. N. Y.); In *re Friedrich*, 28 A. B. R. 656, 199 Fed. 193 (D. C. Minn.); In *re Miller*, 30 A. B. R. 113, 203 Fed. 170 (D. C. N. Y.).

²⁸. See ante, § 1850.

§ 2502. Concealment by Purposely Omitting Assets from Schedules.—Concealment may be perpetrated, amongst other ways, by purposely omitting assets from the schedules in bankruptcy.²⁹

In *re Skinner*, 3 A. B. R. 163, 97 Fed. 190 (D. C. Iowa): "It having, therefore been conclusively determined in a suit between the bankrupt and his creditors, represented by the trustee, that the bankrupt had conveyed to his wife, without consideration, and with intent to defraud his creditors, property to a large amount, and it appearing from the record in this case that when the bankrupt filed his petition and schedules he stated that he had no property of any kind, except a possible equity of redemption in 1,440 head of sheep mortgaged to a named creditor, the court is justified in finding that the bankrupt has knowingly and fraudulently concealed from his trustee property to a large amount, which in fact forms part of his estate, and therefore under the provisions of §§ 14 and 29 of the Bankrupt Act the petitioner is not entitled to his discharge."

However, concealment does not, really, consist of any one act, so the failure to schedule is, after all, nothing but evidence tending to show concealment.³⁰

§ 2503. And Amendment after Discovery Will Not Cure.—And the amendment of the schedules after the creditors' discovery of the concealment will not cure the act.³¹

§ 2504. But Omission to Schedule, Not Per Se Concealment.—But the mere omission from the schedules is not per se a concealment—the omission must be intentional. Thus, the mere omission of even fraudulently transferred property is not per se concealment of it.³²

Nor is the fact that certain assets were duly scheduled, conclusive as to the question of intentional concealment.

In *re Doyle*, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.): "The fact that at the outstart the bankrupt scheduled such shares as an asset would seem to strongly negative the bona fides of the assignment. His absolute control over the stock from the time it was issued down to the bankruptcy to the positive

²⁹. In *re Lowenstein*, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y.); In *re Berner*, 4 A. B. R. 983 (Ref. Ohio, affirmed by D. C.); obiter, In *re Toothaker Bros.*, 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.); instance, *Osborne v. Perkins*, 7 A. B. R. 250, 112 Fed. 127 (C. C. A. Mass.); instance, In *re Breitling*, 13 A. B. R. 126, 133 Fed. 146 (C. C. A. Ills.); instance, *Vehon v. Ullman*, 17 A. B. R. 435, 147 Fed. 694 (C. C. A. Ills.); *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa); instance, In *re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.); compare, In *re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.), quoted at § 2500; In *re Friedrich*, 28 A. B. R. 656, 199 Fed. 193 (D. C.

Minn.); instance, In *re Samuel Borg*, 25 A. B. R. 189, 184 Fed. 640 (D. C. Minn.); In *re Cantor*, 26 A. B. R. 859 (Sp. M. N. Y.); In *re Graves*, 26 A. B. R. 633, 189 Fed. 847 (D. C. Pa.); instance, In *re McCann*, 24 A. B. R. 789, 179 Fed. 575 (D. C. Pa.), quoted at § 2505. But compare, In *re Hennebry*, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa).

³⁰. Impliedly, *Johnson v. United States*, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.), quoted at § 2323.

³¹. In *re Breiner*, 11 A. B. R. 684, 129 Fed. 155 (D. C. Iowa).

³². See post, § 2511. Compare instance in footnote to § 2522. In *re Hennebry*, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa).

exclusion of his wife, his various pledges thereof to banks and Belding Bros. without informing the pledges until after the bankruptcy of his assignment to his wife, his assumed ownership, the failure of himself and wife to assert to Gebbie during the complications with the Milk Company the wife's ownership of the stock, the failure to transfer the same on the books of the company, are all circumstances which to my mind indicate the absence of an intention to legally transfer the stock to Mrs. Doyle. The purported assignments standing alone, without the delivery of the property therein described or without some affirmative act indicating Mrs. Doyle's ownership thereof, do not persuade me of the legality of the assignments, or that the bankrupt actually divested himself of title thereto."

Indeed, as previously noted³³ concealment is rather a continuing intentional state than a mere act; and omission to schedule is rather evidence tending to show that state and to show it to be intentional than it is per se concealment.

§ 2505. Concealment of Fraudulently Transferred Property.—Concealment may be perpetrated by purposely failing to schedule, or otherwise failing to disclose when called upon, fraudulently transferred property that would have been recoverable by the trustee.³⁴

[1867] In re Antisdell, 18 N. B. Reg. 289 (D. C. N. Y.): "The second subdivision of § 5110 (Act of 1867) required the court to refuse a discharge, 'if the bankrupt has concealed any part of his estate or effects.' This specification is satisfied by proof that the bankrupt has concealed his title to real estate, by leaving out of his schedules property that has been conveyed by him in fraud of his creditors."

And it has been held that prima facie proof of intentional concealment exists where such omission is of a transfer to a near relative.

In re McCann, 24 A. B. R. 789, 179 Fed. 575 (D. C. Pa.): "The exceptants concede—and, indeed, the authorities would compel the concession—that if a bankrupt, while insolvent, conveys property to a near relative without consideration, and afterwards fails to disclose the existence of such property in his schedules, he is prima facie guilty of concealing assets from his trustee, although the conveyance may have been made more than four months before the petition was filed. I say prima facie, because such a transaction as is thus supposed may no doubt have been innocent; and, if its innocence be made to appear, the conveyance and the subsequent omission of the property from the schedules will interpose no obstacle to the bankrupt's discharge."

§ 2506. But Property Must Be Recoverable, Else Not Concealment of Property "Belonging to Estate."—But it is only where the

³³. Compare ante, §§ 2498, 2502.

³⁴. In re Welch, 3 A. B. R. 93, 100 Fed. 65 (D. C. Ohio); In re Skinner, 3 A. B. R. 163, 97 Fed. 190 (D. C. Iowa), quoted ante, § 2502; obiter, In re Toothaker, 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.); [1867] In re Hussman, 2 B. Reg. 437, Fed. Cases 6,951; [1867] In re Rathbone, 1 B. Reg. 536,

2 B. Reg. 260; [1867] In re Hill, 1 B. Reg. 431; [1867] In re Goodridge, 2 B. Reg. 324; contra, In re Crenshaw, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.); impliedly, In re Hirsch, 2 A. B. R. 715 (D. C. Tenn.); obiter, In re Wakefield, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.).

property is recoverable by the trustee that a fraudulent transfer made before the bankruptcy could form the basis of such concealment as would bar discharge; for the concealment must be concealment of property belonging to the estate, and it could hardly be held to belong to the estate if not recoverable at the time of the bankruptcy. And since the concealment, to be a bar, must be concealment from the trustee, the recoverability, likewise, must be by him. On the other hand, demonstration of recoverability, by actual suit, is not to be required.³⁵

Of course, a fraudulent transfer within the four months is made in and of itself a separate bar to discharge by the amendment of 1903, and continued recoverability is not requisite in such cases.

§ 2507. Concealment, Even Where Fraudulent Transfer Occurred More than Four Months before Bankruptcy, if Property Still Recoverable.—Concealment may be so perpetrated, though the fraudulent transfer occurred more than four months before the bankruptcy, provided the property or its proceeds be still recoverable.³⁶

Obiter, *In re Toothaker Bros.*, 12 A. B. R. 100, 128 Fed. 187 (D. C. Conn.): "The counsel for Murray is forced by the logic of the situation to contend that a bankrupt may transfer property to his wife without consideration, and in fraud of his creditors, and with the latter purpose in view, at any date which shall be more than four months prior to his petition in bankruptcy, and with like fraudulent purpose may fail to mention such property in his schedules, and yet demand a full bill of financial health in spite of the protestations of his creditors."

§ 2508. Or Where It Occurred before Passage of Act, if Still Recoverable.—Concealment may be so perpetrated, though the fraudulent conveyance occurred before the passage of the Bankruptcy Act, provided the property could still have been recovered by the trustee.³⁷

^{35.} *In re Hammerstein*, 26 A. B. R. 757, 189 Fed. 37 (C. C. A. N. Y.).

^{36.} *In re James*, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C., affirmed sub nom. *James v. Stone*, 24 A. B. R. 288, 181 Fed. 1021, C. C. A.); *In re Wakefield*, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.); instance, *In re Samuel Borg*, 25 A. B. R. 189, 184 Fed. 640 (D. C. Minn.); *In re McCann*, 24 A. B. R. 789, 179 Fed. 575 (D. C. Pa.), quoted at § 2505; *James v. Stone*, 24 A. B. R. 288, 181 Fed. 1021 (C. C. A. N. C., affirming *In re James*, 23 A. B. R. 703, 175 Fed. 894). Compare, analogously and obiter, *In re Boner*, 22 A. B. R. 151, 169 Fed. 727 (D. C. Va.).

Property concealed from former assignee to whom title to all property of the bankrupt had previously been conveyed, the assignment itself not being nullified by the bankruptcy, does

not constitute concealment from the subsequent trustee in bankruptcy. *In re Berner*, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.); obiter, *In re Lesser*, 8 A. B. R. 15, 114 Fed. 83 (C. C. A. N. Y., disapproving 5 A. B. R. 330). But this would hardly be the case had creditors in bankruptcy had the right to pursue such assets. The only right of the creditors in bankruptcy was to insist on the assets being turned over to the former assignee, unless facts showed an abandonment by him.

^{37.} Obiter, *In re Gaylord*, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y., affirming 5 A. B. R. 410, and distinguished in *In re Conroy*, 14 A. B. R. 250, 134 Fed. 764, D. C. Pa.); *In re Berner*, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.).

Obiter, *In re Dauchy*, 11 A. B. R.

In re Quackenbush, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.): "In 1891 the bankrupt could have transferred his entire property to a single creditor to the exclusion of all the rest, and the transaction, had it ended there, would not have affected his right to a discharge in the remotest degree. If, however, the creditor holds the property in trust for the bankrupt, a very different proposition is presented.

"The difficulty with the bankrupt's contention is that the transaction did not end in 1891. By virtue of transfers made prior to July 1, 1898, the bankrupt is still enjoying property which equitably belongs to his creditors.

"The referee, after seeing and hearing the witnesses, has found that the transfer of the personal estate, which vested absolutely in the bankrupt upon the death of his first wife, was merely a juggle by which the legal title was temporarily vested in another to prevent the property from being reached by creditors. In short, this property was the property of the bankrupt."

But is not within the meaning of the statute where the property could not be considered as "his" property, as would be the case where no secret trust were shown to exist in favor of the bankrupt.³⁸

In re Countryman, 9 A. B. R. 572, 119 Fed. 637 (D. C. Iowa): "Under these circumstances, in order to defeat the discharge, it must be clearly shown that when the petition in bankruptcy was filed, the bankrupt really owned the land or an interest therein, and this the evidence fails to show. The conveyance to the husband, even if it was not based upon a money or other valuable consideration, would be good between the parties, and would bar a claim thereto by the wife [the bankrupt in the case], unless it was shown that when the transfer was made she retained an actual interest therein."

Or where the conveyance was made twenty-five or thirty years before, no fraud being shown.³⁹

But where, for many years, a debtor after a failure did business ostensibly as manager for a firm composed of his wife and brother, but received no fixed salary and drew whatever money he needed, his wife knowing little about the business, although it is alleged she had contributed \$10,000

511, 130 Fed. 532 (C. C. A. N. Y., affirming 10 A. B. R. 527, 122 Fed. 688). But in this case it was distinctly held that no secret trust was shown to be still existing.

Impliedly, *Hudson v. Mercantile Nat'l Bank*, 9 A. B. R. 432, 119 Fed. 346 (C. C. A. Colo.); compare, analogously, *In re Herrman*, 13 A. B. R. 778, 134 Fed. 566 (C. C. A. N. Y.).

Impliedly, *U. S. v. Cohn*, 15 A. B. R. 357, 142 Fed. 983 (D. C. N. Y.).

Compare, under law of 1867, *In re Murdock*, Fed. Cases 1,010; [1867] *In re Hussman*, 2 N. B. Reg. 437; [1867] *In re Keefer*, 4 N. B. Reg. 126, Fed. Cas. 7,636; [1867] *In re Hollenshade*, Fed. Cases 6,610; [1867] *In re Rosenfeld*, Fed. Cases 12,058; [1867] *In re Jones*, Fed. Cases 932; [1867] *In re Moore*, Fed. Cases 663, No. 9,751; [1867] *In re Lord*, Fed. Cas. 872; [1867] but contra, *In re Cretiew*, Fed. Cas. 810.

The case *In re Webb*, 3 A. B. R. 386, is not contra for two reasons, namely, first, that the conveyance therein complained of was merely preferential under the bankruptcy act and not preferential under the State law and therefore was not illegal when made; and second, that the property involved could not have been recovered by the trustee.

Contra, compare case cited in opinion in *Paxton v. Scott*, 10 A. B. R. 80, 66 Neb. 385, 92 N. W. 611.

38. *In re House*, 4 A. B. R. 603, 103 Fed. 616 (D. C. N. Y.); *In re Berner*, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.); *In re Quackenbush*, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.); *In re Fitchard*, 4 A. B. R. 609, 103 Fed. 742 (D. C. N. Y.); *In re Dauchy*, 10 A. B. R. 527, 122 Fed. 688 (D. C. N. Y.).

39. *In re Goodale*, 6 A. B. R. 493, 109 Fed. 783 (D. C. N. Y.).

thereto at the beginning, he and his family living in expensive style, it was held a failure to schedule an interest in the business was a concealment of assets.⁴⁰

§ 2509. Even Where No Debts Existed and Transfer Fraudulent Only because in Contemplation of Future Creditor.—Concealment may be perpetrated even though no present debts were then in existence, if the voluntary transfer were made in contemplation of contracting subsequent indebtedness or of engaging in a hazardous undertaking; ⁴¹ but it is not perpetrated, if the transfer were not made in contemplation of subsequent indebtedness.⁴²

§ 2510. Concealment of Property Held on "Secret" or Resulting Trust, Title Never Having Been in Bankrupt.—Concealment may be perpetrated even by purposely failing to schedule property held on secret or resulting trust for the debtor's benefit, where the legal title to it has never been in the bankrupt.⁴³

Hudson v. Mercantile Nat'l Bank, 9 A. B. R. 436, 119 Fed. 346 (C. C. A. Colo.): "We are of the opinion, therefore, in view of what has been said, that it was the bankrupt's duty, when he filed his schedules in bankruptcy, to have included the two quarter sections of land standing in the name of his son Walter Hudson as a part of his property; and the fact that he did not do so, taken in connection with the fact that the record title stood in the name of his son, amounts, we think, to a willful and fraudulent concealment of property from his trustee within the purview of § 29 of the Bankrupt Act; and the act in question being an offense under the latter section, it constitutes sufficient ground for refusing a discharge, under subdivision b of § 14 of the Bankrupt Act. It has been held on several occasions by courts of bankruptcy that where a person, prior to filing a petition in bankruptcy, conveys the whole or a part of his property to a third party to be held in secret trust for himself, and fails to schedule it as a part of his assets, such an act amounts to a fraudulent concealment of assets which will defeat his right to a discharge. In *re Welch* (D. C.), 3 Am. B. R. 93, 100 Fed. 65; In *re Bemis* (D. C.), 5 Am. B. R. 438; In *re Becker* (D. C.), 106 Fed. 54. In the case at bar, as already shown, the bankrupt either has a resulting trust in the two tracts of land in question, which arose without fraud, or Walter Hudson holds the land in secret trust for the benefit of the bankrupt, the trust having been created to defraud creditors; and in either event, as it seems, the land ought to have been scheduled by the bankrupt as a part of his estate, and his failure to do so amounts to a concealment of assets."

As where the bankrupt, while insolvent, systematically bought real estate and had the title to it placed in his wife's name.⁴⁴

⁴⁰. In *re Herrman*, 13 A. B. R. 778, 134 Fed. 566 (C. C. A. N. Y.).

⁴¹. In *re McNamara*, 2 A. B. R. 579 (Special Master N. Y., citing *Case v. Phelps*, 5 N. B. Reg. 452); In *re Samuel Borg*, 25 A. B. R. 189, 184 Fed. 640 (D. C. Minn.).

⁴². Impliedly, *Fields v. Karter*, 8 A. B. R. 351, 115 Fed. 950 (C. C. A. Ala.).

⁴³. In *re Lowenstein*, 2 A. B. R. 193 (Ref. N. Y., since appointed district judge); In *re Quackenbush*, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.); In *re Berner*, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.).

⁴⁴. In *re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.).

§ 2511. "Secret Trust" in Bankrupt's Favor Generally Requisite to Show Continuing and Intentional Concealment of Fraudulent Transfers.—Generally, in order to prove that the concealment still continues and is being knowingly and fraudulently perpetrated, and sometimes also in order to prove that the property is recoverable for the benefit of the estate and therefore "belongs" to the estate, it is necessary to show that a secret trust exists in the bankrupt's favor.

The omission of fraudulently transferred property must have been done purposely to constitute concealment; for, as previously noted in § 2504, the mere omission to schedule property is not per se or ipso facto the concealment of it.⁴⁵

In re Cornell, 3 A. B. R. 172, 97 Fed. 29 (D. C. N. Y.): "To have this effect there must be evidence of concealment of property from the trustee. This can only be made out by evidence of some remaining property in trust for the bankrupt's use existing at the time of the petition in bankruptcy."

And declaring "No assets" but listing, in the schedule of exempted property, Schedule B (5), certain property claimed as exempt does not constitute a concealment, the property being actually listed although properly it should be listed also as assets in some other part of Schedule "B."

In re Countryman, 9 A. B. R. 572, 119 Fed. 637 (D. C. Iowa): "The bankrupt's failure to schedule land she conveyed to her husband in 1895 is no reason for refusing her discharge, unless it is clearly shown that she was the real owner of the land or of an interest therein at the time she filed her petition in bankruptcy."

And continuing concealment, such as will suffice to bring within the bar of discharge as a concealment a transaction originating before bankruptcy, must consist of something more than the merely incidental concealment usually accompanying fraudulent transfers.⁴⁶

But such omission, when the property is still held on secret trust, affords

45. See ante, § 2504. Hudson Mercantile National Bank, 9 A. B. R. 436, 118 Fed. 346 (C. C. A. Colo.); In re Freund, 3 A. B. R. 418 (D. C. N. Y.); In re Hirsch, 2 A. B. R. 715 (D. C. Tenn.); inferentially, In re Steindler & Hahn, 5 A. B. R. 63 (D. C. N. Y.); In re Jacobs & Verstanding, 17 A. B. R. 475 (D. C. Ore.); In re Morrow, 3 A. B. R. 263 (D. C. Calif.); In re Semmel, 9 A. B. R. 352 (D. C. Pa.); U. S. v. Levinson & Kornblut, 13 A. B. R. 32 (D. C. S. C.); In re Schreck, 1 A. B. R. 366 (Special Master N. Y.); In re Berner, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.); In re Lowenstein, 2 A. B. R. 193 (Ref. N. Y.); In re Crenshaw, 2 A. B. R. 623 (D. C. Ala.); In re Pierce, 4 A. B. R. 554 (D. C. N. Y.); In re Fitchard, 4 A. B. R. 609 (D. C. N. Y.); Fellows v. Freudenthal, 4 A. B. R. 490 (C. C. A. Ills.); In re

House, 4 A. B. R. 603 (D. C. N. Y.); In re Quackenbush, 4 A. B. R. 274 (D. C. N. Y.).

Compare, In re Gammon, 6 A. B. R. 482 (D. C. Iowa), where a husband had turned over all his property to his wife and pretended to be working for her for nothing and failed to schedule the assets as his own.

Compare interesting historical review of the legislation, In re Maher, 15 A. B. R. 788 (Ref. Mass.). Impliedly, In re McGurn, 4 A. B. R. 459 (D. C. Nev.).

Inferentially, In re Wakefield, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.).

46. Bank v. DePauw Co., 5 A. B. R. 345 (C. C. A. Ind.); inferentially, In re House, 4 A. B. R. 603 (D. C. N. Y.); In re Quackenbush, 4 A. B. R. 274 (D. C. N. Y.).

strong if not conclusive proof of intentional concealment.⁴⁷

In *re Cornell*, 3 A. B. R. 172, 97 Fed. 29 (D. C. N. Y.): "To have this effect there must be evidence of concealment of property from the trustee. (Section 29). This can only be made out by evidence of some remaining property in trust for the bankrupt's use existing at the time of the petition in Bankruptcy."

In *re Berner*, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.): "A fraudulent conveyance by the bankrupt is not in itself a bar to the bankrupt's discharge.

"But the intentional and fraudulent omission to schedule property previously conveyed by the bankrupt in fraud of creditors, whether it was conveyed prior or subsequently to the passage of the Bankruptcy Act, will be a bar to his discharge, where the property is being held upon secret trust for his benefit; and this is so for three reasons: (a) Concealment of the assets is a continuous act, and is perpetrated whenever the duty to reveal them exists and is knowingly disregarded. (b) Concealment of assets may be effected as well by the concealment of the title to the property as by the actual hiding of the property itself. (c) It is not necessary that the bankrupt be able himself to recover his property by suit; it is sufficient if his creditors, or rather, his trustee in bankruptcy, have standing in court for this purpose.

"But it is necessary in order that omission to schedule the property shall bar the discharge, that a secret trust in it be shown to be existing in favor of the bankrupt, no place being provided on the schedules for listing fraudulently conveyed property, except such as is held in trust for him; and there being ambiguity in the statute directing what he shall list, and also in the prescribed oath."

In *re Crenshaw*, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.): "In the absence of proof of intentional wrong in making the oath, the bankrupt failing to schedule and deliver up the property for the benefit of his creditors will not bar his discharge even though the transfer to his wife may have amounted to constructive fraud and have been void as against creditors."

In *re Crist*, 9 A. B. R. 1, 116 Fed. 1007 (D. C. Ala.): "He further found that it did not appear that the property was held in secret trust for the benefit of the bankrupt. * * * The conveyance, though in law fraudulent and void, is not a concealment of the property conveyed, in contemplation of § 29 (b), Bankrupt Act."

In *re House*, 4 A. B. R. 603, 103 Fed. 616 (D. C. N. Y.): "What assets should the bankrupt have placed in his schedules? A claim against his wife? He could not have recovered the money, whether his gift was made in fraud of

⁴⁷ Also, *U. S. v. Levinson & Kornblut*, 13 A. B. R. 32 (D. C. S. C.); In *re Bemis*, 5 A. B. R. 36, 104 Fed. 672 (D. C. N. Y.); In *re Schreck*, 1 A. B. R. 366 (Special Master N. Y.); *Steindler & Hahn*, 5 A. B. R. 63 (Special Master); In *re Quackenbush*, 4 A. B. R. 273, 102 Fed. 282 (D. C. N. Y., distinguished in *re Fitchard*, 4 A. B. R. 609); In *re Hoffman*, 4 A. B. R. 331, 102 Fed. 979 (D. C. N. Y.); In *re Pierce*, 4 A. B. R. 554 (D. C. N. Y.); In *re Fitchard*, 4 A. B. R. 609, 103 Fed. 743 (D. C. N. Y.); *Fellows v. Freudenthal*, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.); inferentially, In *re Kolster*, 17 A. B. R. 54 (D. C. Nev.).

In *re Warne*, 10 Fed. 377, Id., 12

Fed. 431, in which it was held that the verification of schedules from which certain claims have been omitted, apparently inadvertently and from oversight and without motive, is not the taking of a false oath. In contemplation of law an oath is not falsely taken unless willfully made.

In *re Jacobs*, 16 A. B. R. 484, 144 Fed. 868 (D. C. N. J.); In *re Welch*, 3 A. B. R. 93, 100 Fed. 65 (D. C. Ohio); impliedly, In *re Smith*, 3 A. B. R. 95, 100 Fed. 795 (D. C. Ga.). Compare. In *re Gammon*, 6 A. B. R. 482, 109 Fed. 312 (D. C. Iowa), where bankrupt turned over all his property to his wife and claimed to be working for her for nothing.

his creditors or otherwise. The cause of action for such recovery was in the creditor, and the gift could be avoided only at the instance of the creditor. As to all other persons, including the donor, the gift was valid."

In re Dauchy, 10 A. B. R. 527, 122 Fed. 688 (D. C. N. Y.): "In such case the transfer would be not only in fraud of creditors, but for the purpose of concealing the property from her trustee in bankruptcy when appointed and her failure to schedule the property and disclose the facts might properly be held a concealment from her trustee while a bankrupt, within the true meaning of the law."

In re Dauchy, 11 A. B. R. 511, 130 Fed. 532 (C. C. A. N. Y., affirming 10 A. B. R. 527, 122 Fed. 688): "In order to establish a fraudulent concealment it must appear that the property concealed belongs to the bankrupt's estate. It must be shown that the transfer was merely a temporary expedient to place the property beyond the reach of the trustee, the title to be resumed by the bankrupt as soon as prudence will permit. In other words, it must be proved that a secret trust exists in her favor, and that her son is under agreement, expressed or implied, to reconvey the property to her when the danger of attack by the creditors has passed."

In re Countrymen, 9 A. B. R. 572, 119 Fed. 637 (D. C. Iowa): "Under these circumstances, in order to defeat the discharge, it must be clearly shown that, when the petition in bankruptcy was filed the bankrupt really owned the land or an interest therein, and this the evidence fails to show."

But the precise terms of any such secret understanding need not be proved.⁴⁸

Concealment implies present possession or control.⁴⁹ And the exercise of dominion over property is the highest indicium of actual ownership.⁵⁰ An apparently merely preferential transfer may be shown to be a fraudulent transfer by proof of the existence of a secret trust.⁵¹

For a husband to continue to live with his wife on a farm he had given her, and to work the farm, is not, however, sufficient proof of a secret trust.

In re Wermuth, 24 A. B. R. 785, 179 Fed. 1009 (D. C. N. Y.): "There is no proof that there was any agreement or understanding between the bankrupt and his wife that he should retain or have any interest in such property, or any of it, or that it should ever be reconveyed to him, except the court is asked to infer that such was the fact from the fact that since such transfer Wermuth has continued to live with his wife on this place and other real estate which she purchased, and work and carry same on, not as his own, however, as there is no claim the ownership of the wife has been concealed, or that he or she has claimed or admitted he had any interest therein. I do not think a secret trust or ownership can be inferred from the facts appearing."

"There may be such a holding and management of property, retention of possession, custody, and control, as to show an agreement that a secret interest has been retained by the grantor and that such is the common under-

48. U. S. v. Levinson & Kornblut, 13 A. B. R. 32 (D. C. S. C.).

49. In re Idzall, 2 A. B. R. 741, 96 Fed. 314 (D. C. Iowa); In re Berner, 4 A. B. R. 383 (Ref Ohio, affirmed by D. C.); inferentially, In re Dauchy, 10

A. B. R. 527 (D. C. N. Y., and 11 A. B. R. 512, 122 Fed. 691, C. C. A. N. Y.).

50. In re Semmel, 9 A. B. R. 356, 118 Fed. 487 (D. C. Pa.); [1867] In re Hussman, Fed. Cas. No. 6,951.

51. See ante, §§ 1221, 1305.

standing. But this is not such a case. The bankrupt was not under obligation to leave his wife, and she did not peril her ownership by not turning him out of doors. It was his duty to live with her and aid in her support. There is no proof that the bankrupt did more for the wife than his board, etc., were worth."

§ 2512. And "Secret Trust" Not Requisite Where "Fraudulent Conveyance within Four Months," Charged.—A secret trust need not be shown where the ground charged is a fraudulent conveyance within the four months preceding bankruptcy, under the amendment of 1903; for the fraudulent conveyance is itself, as a conveyance, a bar and not because of its "concealment."⁵²

Compare, *obiter*, *In re Brumbaugh*, 12 A. B. R. 204, 128 Fed. 97 (D. C. Penn.): "Moreover, if there was really any fraud in the transaction it took place more than four months prior to the proceedings in bankruptcy, and it is only where there has been a fraudulent transfer of property within the period that a discharge is barred." This *obiter* in *In re Brumbaugh* evidently was based on the same principles enunciated in the old law of 1867 in the case *In re Pierson*, Fed. Case 11,153 and *In re Locke*, Fed. Cas. 8,439.

§ 2513. But "Concealment" and "Fraudulent and Knowing Intent" Provable Otherwise than by Continuing Secret Trust.—But it would hardly seem necessary to prove the existence of a continuing trust in the bankrupt's favor, if, in some other way, it is shown that the property is still recoverable, and that the bankrupt knew the property belonged to his creditors when he made oath to his schedules and omitted the same.

§ 2514. "Concealment" Must Be of Property "Belonging to Estate."—"Concealment, in order to bar discharge, must be concealment of property "belonging to the estate."⁵³

Verhon v. Ullman, 17 A. B. R. 438, 147 Fed. 694 (C. C. A. Ills.): "The whole question' said the referee, 'turns on the question of intent.' * * * While intent is a pertinent inquiry, intent is not the sole inquiry. The substance of the offense is the withholding of assets; so that the true inquiry is whether, with fraudulent intent, he withheld from his schedule property belonging to his creditors. Apart from the withholding of assets, the intent constitutes no cause for denying a discharge; and the lists omitted, constituting no part of the property coming to the creditors, as already stated, there was no withholding of assets, and no cause made out for a refusal of the discharge."

§ 2515. Merely Working for Another, Even without Pay, While Insolvent, No Concealment.—There can be no "concealment," sufficient to bar discharge, by the debtor's merely working for another, with or without pay, while insolvent, unless the proceeds of the labor are concealed.⁵⁴ Labor

⁵². Inferentially, *In re Dauchy*, 10 A. B. R. 527 (D. C. N. Y., affirmed by C. C. A., 11 A. B. R. 511).

⁵³. Bankr. Act, § 29 (b) (1); *In re Quackenbush*, 4 A. B. R. 295, 102 Fed. 282 (D. C. N. Y.); *obiter*, *In re Wake-*

field, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.). See ante, § 2511, "Secret Trust, etc."

⁵⁴. Impliedly, *In re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.).

is not tangible property capable of being concealed; and an insolvent debtor is under no obligation to labor for his creditors but may even give away his labor. Of course, if an actual interest in the business exists, or the debtor is actually concealing salary or wages earned, the case is different. This subject is taken up in another form in the next paragraph.⁵⁵

§ 2516. Thus, Beginning New Business as Agent for Another.—The debtor's mere starting up of a new business, after his own failure, for and in the name of his wife or of some other person, if it be not on capital belonging to himself, even though the debtor does so because creditors could otherwise reach the avails of his labor, is no ground for barring discharge,⁵⁶ unless he actually is interested in the business or unless specific property, once his, or its proceeds, can be pointed out as being concealed in the new business. A man may work for his wife or for another, after his own failure, for nothing, if such other is the source of the capital invested and he himself contributes nothing but his own labor: there can be no fraudulent transfer of one's labor, and a man may give away his labor, though insolvent; for creditors have no power to make him work for them.⁵⁷

In *re Fitchard*, 4 A. B. R. 609, 103 Fed. 742 (D. C. N. Y.): "Briefly stated, the case presented is that of a man who, having failed with judgments against him, transacts business thereafter in the name of his wife for the purpose of preventing his creditors from reaching the avails of his labor. There is nothing unusual in this situation. Thousands of insolvents, since the repeal of the Bankruptcy Act of 1867, have resorted to similar devices. One of the main objects of the present law is to emancipate this vast army of unfortunates by permitting them to emerge from a questionable and undignified seclusion and face the vicissitudes of the business world openly and honestly. The court has no difficulty in finding that the business of the bankrupt was conducted in the name of his wife for the purpose of preventing his creditors from reaching the products of his industry and skill. The title to the real estate was placed in her name for a like reason; but there is nothing in the present act which makes such conduct a ground for withholding a discharge. To prevent the discharge property belonging to the bankrupt must be fraudulently concealed from his trustee. The record does not show a case of this kind. When the bankrupt failed in 1884 his entire estate, apparently, was swept away. He was insolvent in the sum of nearly \$4,000. Since then, unless the testimony is to be rejected arbitrarily and suspicion and conjecture substituted, the bankrupt has transacted business for his wife, the capital being money which she borrowed and placed in his hands. He gave up everything when he failed; there is not a dollar's worth of the property which he then owned now in existence; there is nothing that the trustee can put his hand on and assert that it was

55. See labor not transferable as preference, ante, § 1280. Compare, also, to same effect, In *re Hedley*, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.). Compare, In *re Taylor*, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.). Compare, In *re Wermuth*, 24 A. B. R. 785, 179 Fed. 1009 (D. C. N. Y.), quoted ante, § 2511.

56. In *re Hedley*, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.). Compare, to same general effect, In *re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.).

57. Compare facts, In *re Wermuth*, 24 A. B. R. 785, 179 Fed. 1009 (D. C. N. Y.), quoted at § 2511.

once the property of the bankrupt. The property which is the subject of controversy was never owned by the bankrupt. With the exception of a few months when the title to the Seeley property stood in his name, he never held the equitable or legal title to any of it. What property did he conceal? Where is it situated? In what language can the court describe it? If he owns no property it is manifest that he can conceal no property. The general facts resemble those disclosed in the case of *In re McGurn*, supra, and in the case of *Freund* (D. C.), 3 Am. B. R. 418, 98 Fed. 81, where the business was transacted by the bankrupt as the agent of his wife. A married woman may carry on business with her husband as agent, and the fact that he receives no compensation other than his support does not impair her title to the property or subject it to the claims of his creditors. Such an arrangement, considered ethically, may be a fair subject of discussion, but that it can be upheld from a legal point of view, is beyond doubt. In *Abbey v. Deyo*, 44 N. Y. 343, Judge Hunt, who delivered the opinion of the Court of Appeal, says, at page 346:

"The appellant's counsel insists that the services, the time and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their prejudice. The one, he says, is as much their property as the other. This argument is entirely unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is the support of his family. The instinctive impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friends, or conceal it from his creditors. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friends. No law, ancient or modern, of which I am aware, has ever held to the contrary. No country, unless both barbarous and heathen, has ever authorized the sale of the person of a debtor for the satisfaction of his debts.' See also, *Buckley v. Wells*, 33 N. Y. 518; *Knapp v. Smith*, 27 N. Y. 278."

"Even were it proved that the property in dispute was once owned by the bankrupt, and that years prior to the passage of the act he transferred it to his wife, such a conveyance, in the absence of proof that the property is held for the bankrupt by a secret trust, cannot bar a discharge under any of the provisions of the present act. Where property owned by the bankrupt is actually in existence, and is in fact concealed from the trustee, 'or where the title is concealed by a colorable conveyance, the discharge should be refused.' Where neither of these conditions exists, it should be granted. In *re Murdock*, 1 Low. 362, 17 Fed. Cas. 1010 (No. 9,939); In *re Boyntown* (D. C.), 10 Fed. 277.

"Counsel for the creditors relies upon the *Quackenbush Case* (D. C.), 4 Am. B. R. 274, 102 Fed. 282; but the case at bar lacks the essential element which there induced the court to refuse the discharge. In the *Quackenbush Case* the referee found that the bankrupt had in his possession and under his control property, in specie, which had been transferred by him to his wife without consideration, by a mere legal fiction, to prevent his creditors from reaching it. But for this fraudulent title the trustee could lay his hands upon and divide among the creditors the identical property once owned by the bankrupt. In other words, it was the property of the bankrupt which he had attempted to hide by a veil so transparent that the failure was visible to the most unob-

serving. All these ingredients are lacking in the case at bar. There is no property which can be said to belong to the bankrupt, there is no concealment and no fraud.

"The report of the referee is confirmed, the exceptions are overruled and the discharge is granted."

In *re Adams*, 4 A. B. R. 698, 104 Fed. 72 (D. C. N. Y.): "Starting with the proposition, which cannot be controverted, that the assignment was and is a valid instrument vesting the title in Eldred to all the property, there is little difficulty in discovering the fallacy of the arguments in opposition to the discharge. They all rest upon the unsupported assumption that the assignment was a fraudulent device intended to create a secret resulting trust in favor of the bankrupt. Since the assignment the bankrupt has been endeavoring to support himself and family and has transacted business as agent for his daughters, a makeshift not infrequently resorted to by insolvent debtors who seek to exempt their future earnings from the grasp of creditors. His action in this regard may be the subject of criticism, but that it was not illegal has been asserted by the highest judicial authority. *Abbey v. Deyo*, 44 N. Y. 343, and cases cited. Surely it did not amount to a fraudulent concealment of his property.

"The assignee leased to one of the bankrupt's daughters a hop yard, which was part of the assigned property, and she realized about \$800 from its cultivation. That was in 1892. About the same time a small lumber business was organized under the name of the Adams Lumber Company. The bankrupt's daughters were the partners in this enterprise. They furnished the capital, but took no active part in the business, which was managed by the bankrupt, who contributed his experience, labor and skill. The business was at no time remunerative, and there is nothing to show that anyone connected with it was able to save any of the profits received therefrom. Certainly there is no proof that the bankrupt has property, derived from the hop yard or the lumber company, which he has hidden from his trustee."

§ 2517. Exact Value of Assets Concealed Need Not Be Capable of Ascertainment, if of Value.—The exact value of the assets concealed need not be capable of ascertainment, and, indeed, may be contingent, yet if the assets have value, it is sufficient.⁵⁸

§ 2518. Even if of Small Value, Intentional Concealment Will Bar.—But if the fraudulent intent to conceal is proved, the discharge should be refused, even though the value of the assets may be small.⁵⁹

Of course, the fact that the assets concealed were of trifling value is competent evidence tending to disprove fraudulent intent.⁶⁰

⁵⁸. In *re Becker*, 5 A. B. R. 438, 106 Fed. 54 (D. C. N. Y.), which was the case of a tontine policy payable to the bankrupt only in the event of his surviving the tontine period.

In *re Schlesinger*, 3 A. B. R. 342, 102 Fed. 117 (D. C. N. Y., affirmed by C. C. A., 4 A. B. R. 361); impliedly, In *re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.).

⁵⁹. In *re Lowenstein*, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y.). Impliedly, as equities in real estate, title being put in wife's name. In *re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.), quoted at § 2541.

⁶⁰. In *re Hirsch*, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.).

§ 2519. Failure of Creditors to Institute Legal Proceedings to Recover Concealed Property Tends to Rebut.—In doubtful cases the failure of the creditors to resort to legal proceedings to recover the property alleged to be concealed is of weight in determining concealment.

In *re Hirsch*, 2 A. B. R. 723, 96 Fed. 468 (D. C. Tenn.): "It is undoubtedly true that the right of the creditors to specify an alleged fraudulent transaction in opposition to a discharge does not depend upon their having taken any legal proceedings, through a trustee or otherwise, to recover the property itself, and, if it appears by the proof that there has been a fraudulent transaction denounced by the statute as a sufficient ground for withholding the discharge, that fact should have no influence whatever; but when the case is doubtful or inconclusive, the fact that the creditors have not proceeded for the substantial benefit of recovering the property is quite suggestive to the court trying the issue of the discharge that the creditors themselves do not deem the proof of fraud very strong.

"The machinery of the bankruptcy statute is designed to furnish creditors with every opportunity to recover the fraudulently concealed property of a bankrupt, and, where they do not resort to that method of redress, they do not stand in the same attitude in opposition to the discharge that they otherwise would. In an evenly balanced condition of the proof, it is a fact which should turn the scales in favor of the bankrupt's discharge, upon the ground that the creditors themselves had been either not very diligent about the proof, or else regarded it as not very formidable, as, indeed, it appears here not to be."

In *re Adams*, 4 A. B. R. 698, 104 Fed. 72 (D. C. N. Y.): "He can be called to answer for his stewardship in the courts of the State. The fact that he has not been asked to account furnishes a strong presumption that the creditors have no valid ground of complaint."

§ 2520. Amendment of Schedules after Discovery of Concealed Assets, of No Avail.—Amendment of the schedules after discovery of assets omitted therefrom for the purpose of concealment from creditors, will not avail the bankrupt.⁶¹

In *re Sussman*, 26 A. B. R. 18, 183 Fed. 331 (D. C. Pa.): "The fact that the bankrupt listed such property after his attempt to conceal the same and after the making of the false oath by him had been discovered will not relieve him from the consequences of such act. The wrongful act when once committed during the proceedings may not be avoided so as to restore the dishonest bankrupt to his former status, and enable him to reap the benefits, notwithstanding the attempt."

Analogously ("false oath" charged), In *re Eaton*, 6 A. B. R. 531, 110 Fed. 731 (D. C. N. Y.): "The filing of the amended schedule, giving a full statement of the property in question, and offering to deliver the certificates of stock to the trustee, is evidence tending to show the absence of an unlawful intent, but it is by no means a conclusive answer to the objections. A ruling that a bankrupt may verify false schedules and, upon discovery, avoid the consequences of his act by an amendment, is contrary to the spirit of the law, which aims to relieve honest debtors only. If the law were so construed, a bankrupt runs no risk

⁶¹. Compare post, § 2543. Also see *States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.).
In *re Breiner*, 11 A. B. R. 684, 129 Fed. 155 (D. C. Iowa); *Kern v. United*

in making a fraudulent return of his property supported by a false oath, for, if undiscovered, he secures the fruits of his wrongdoing, and, if detected, he can still obtain his discharge by amending his schedules so as to contain the information which the creditors have unearthed in spite of his efforts at concealment.

"On the other hand, omissions frequently occur inadvertently, and a prompt acknowledgment of the mistake, accompanied by a return of the property, are circumstances tending to show good faith."

In *re Gross*, 5 A. B. R. 271 (Ref. N. Y.): "The courts are extremely liberal in permitting amendments in cases of mistake or accident; but here we have deliberation and premeditation, and forbearance or clemency should not be extended or the law strained to aid and favor such a bankrupt, whose business career is tainted, and whose conduct towards his creditors has not been formulated on the lines of honest fair dealing. In *re McNamara*, 2 Am. B. R. 566; In *re Welch*, 3 Am. B. R. 93; In *re Lewin*, 4 Am. B. R. 636."

§ 2520½. **Nor Other Aid to Trustee.**—The offense of concealment of assets when once committed cannot be retrieved by right and lawful conduct and the doing of things "meet for repentance."⁶²

§ 2521. **Instances Held Sufficient to Bar Discharge for Concealment of Assets.**—In the footnotes are given instances that have been held sufficient, under the present Bankruptcy Act, to bar discharge on the ground of concealment of assets.⁶³

62. *Kern v. United States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.), quoted at § 2543.

63. 1. Disbursements to relatives on the eve of insolvency upon alleged debts, when previous statements of financial condition, made with the view of obtaining credit, show no debts to them during the same period when the debts are now alleged to have been in existence, there being no memorandum thereof in the usual course of trade made by the bankrupt, held to be a concealment of assets and a bar to discharge, In *re Greenberg*, 8 A. B. R. 94, 114 Fed. 773 (D. C. Conn.).

2. Alleged debts to relatives not mentioned in previous financial statements: In *re Grossman*, 6 A. B. R. 510, 111 Fed. 507 (D. C. Mich.).

3. Failure to schedule property that might have been claimed as exempt, In *re Royal*, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.).

4. Failure to schedule interest in father's estate vested in bankrupt before adjudication, In *re Roosa*, 9 A. B. R. 531, 119 Fed. 542 (D. C. Iowa).

5. Turning bulk of proceeds of cargo of goods (sold at wholesale immediately on receipt) over to one who is not a business creditor, on an alleged debt, where no entry of the original debt appears on the bankrupt's books,

nor entry of the check on his stub book, and the alleged creditor is not called in corroboration, sufficiently proves concealment of assets. In *re Holstein*, 8 A. B. R. 147, 114 Fed. 794 (D. C. Conn.).

6. Omitting property of value from schedules although advised not to omit property of value; and at the same time including property of no value, is, unless explained, conclusive upon the issue of fraud against the bankrupt. *Osborne v. Perkins*, 7 A. B. R. 250, 112 Fed. 127 (C. C. A. Mass.).

7. Bankrupt's evident unwillingness to explain the disposition of property shown to be in his possession a short time before the filing of his bankruptcy petition, where such explanation must have been within the memory of an intelligent man, warrants the inference of concealment of assets and justifies the refusal of discharge, In *re Cabus*, 6 A. B. R. 156 (D. C. N. Y.).

8. Assignment of securities not scheduled, In *re Doyle*, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.).

9. Ostensible corporation but in reality bankrupt's own device for defrauding his creditors by crafty manipulation of stock, etc. In *re Wertheimer*, 6 A. B. R. 756 (D. C. N. Y.).

10. Transfer of business and all other property to wife, on litigation being

threatened, and ostensible employment by her thereafter on an annual salary of \$2500, but the business to all appearance continued in the same manner and in the bankrupt's name, the bankrupt keeping an individual checking account and paying taxes, etc., therefrom; but keeping no books; held to be a continuing concealment, *In re Bemis*, 5 A. B. R. 36, 104 Fed. 672 (D. C. N. Y.).

11. Property put into wife's name with retention of beneficial interest, *In re Steindler & Hahn*, 5 A. B. R. 63 (D. C. N. Y.). *In re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.).

12. Managing as wife's agent business formerly owned by bankrupt himself and transferred to her while threatened with enforcement of large judgment, *In re Welch*, 3 A. B. R. 93, 100 Fed. 65 (D. C. Ohio, distinguished in *In re Locks*, 5 A. B. R. 136, 104 Fed. 783, D. C. N. Y.); analogously (false oath), *In re Gammon*, 6 A. B. R. 482, 109 Fed. 312 (D. C. Iowa).

13. Mortgaging stock to a relative who immediately forecloses; stock bought in by a stranger, who immediately transfers his bid to the bankrupt's friend, who in turn sells to wife, the purchaser handing the money directly to the wife who in turn pays the officer making the sale, *In re Smith*, 3 A. B. R. 95, 100 Fed. 795 (D. C. Ga., distinguished in *In re Locks*, 5 A. B. R. 136, D. C. N. Y.).

14. Doing business in wife's name, books, etc., missing, *In re Gross*, 5 A. B. R. 271 (D. C. N. Y.).

15. Doing fine business for many years after a previous failure but claiming to be doing so as manager of firm composed of wife and brother, wife knowing little about the business, debtor drawing no salary but drawing whatever he wanted from time to time; failure to schedule an interest in the business is concealment of assets, *In re Herrman*, 13 A. B. R. 778 (C. C. A. N. Y.).

16. Failing to schedule tontine policy payable to bankrupt if he outlive tontine period, *In re Becker*, 5 A. B. R. 438, 106 Fed. 54 (D. C. N. Y.).

17. Fraudulently, and in contemplation of bankruptcy, so intermingling his funds with his wife's funds as to render them indistinguishable, doing so to keep his creditors from "jumping on them," *Bragassa v. St. Louis Cycle Co.*, 5 A. B. R. 700, 107 Fed. 77 (C. C. A. Tex., affirming *In re Bragassa*, 4 A. B. R. 519, 103 Fed. 936).

18. Pretending to do business as wife's manager or agent and failing to

schedule the business, *In re Lowenstein*, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y., since appointed district judge).

19. Failure to account reasonably for disappearance of assets, *In re O'Gara*, 3 A. B. R. 349, 97 Fed. 952 (D. C. Ore.); *In re Cashman*, 4 A. B. R. 326, 103 Fed. 67 (D. C. N. Y.).

20. Failure to schedule vested remainder and denial of ownership, being offered, *In re Wood*, 3 A. B. R. 572, 98 Fed. 972 (D. C. N. Y.).

21. Conveying property to wife in fraud of creditors and omitting same from schedules, *In re Skinner*, 3 A. B. R. 163, 97 Fed. 190 (D. C. Iowa).

22. Selling goods worth \$11,000 for \$3,800 and a store worth \$6,000 for \$1,000, etc., indicate dishonest intentions; mutilated accounts; conveyances to relatives, etc., *In re Mendelson*, 4 A. B. R. 103, 102 Fed. 119 (D. C. N. Y.).

23. Chattel mortgage to sister on bankrupt's effects for a fictitious loan, *In re Heyman*, 4 A. B. R. 735, 104 Fed. 677 (D. C. N. Y.).

24. Alleged robbery, as means of accounting for discrepancy of assets, *In re Hershkowitz*, 14 A. B. R. 86, 136 Fed. 950 (D. C. N. Y.).

25. Collusion between trustee and bankrupt as to receipt of money by bankrupt after adjudication, and its being turned over to the trustee, *In re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.).

26. *In re Schenck*, 8 A. B. R. 727, 116 Fed. 554 (D. C. Wash.).

27. *In re Otto*, 8 A. B. R. 305, 115 Fed. 860 (D. C. N. J., affirming 8 A. B. R. 753).

28. Failure to schedule fraudulently conveyed property, *In re Toothaker Bros.*, 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.).

29. Failing to schedule \$861 in cash and nine head of cattle, whilst stating in schedules that he possessed only \$10 in cash, such cash and cattle being subsequently discovered and brought into the estate by trustee. *In re Napier*, 23 A. B. R. 560 (Spec. Master Ky., affirmed by D. C.).

30. Omitting insurance policies from schedules, *In re Sussman*, 26 A. B. R. 18, 183 Fed. 331 (D. C. Pa.).

31. Bankrupt paying back money lent to him for filing petition out of proceeds of sale of goods returned to him after bankruptcy. *In re K. L. Wong*, 30 A. B. R. 125 (Hawaii).

32. *In re Diamond*, 30 A. B. R. 363, 204 Fed. 137 (D. C. Wis.).

33. Inability to explain satisfactorily disappearance of more than \$4,000 received from sale of goods shortly be-

§ 2522. Instances Held Insufficient to Prove Fraudulent Concealment.—In the footnotes also are given instances that have been held, under the present law, insufficient to prove fraudulent concealment of assets.⁶⁴

fore bankruptcy. In re Copleman, 30 A. B. R. 414, — Fed. — (D. C. Mich.).

34. Failure to schedule or give information as to deposit of \$2,000 in wife's name, received by bankrupt shortly before bankruptcy. In re De Mauriac, 30 A. B. R. 677, 206 Fed. 358 (D. C. N. Y.).

35. Where corporation existed merely as a form for business activities of bankrupt, corporation holding property. In re Berger, 29 A. B. R. 712, 200 Fed. 325 (D. C. N. Y.).

64. 1. "Where the record is barren of competent evidence that \$100,000.00 alleged to have been concealed, ever existed, discharge will not be refused." In this case the proof was conclusive that the bankrupt had reported assets of \$153,000 to Dun's Agency but court held conclusive proof of this fact was not proof that he had the assets, In re Lesser, 8 A. B. R. 15, 114 Fed. 83 (C. C. A. N. Y., reversing In re Lesser, 5 A. B. R. 330).

2. Claiming as exempt in Schedule "B" (5) property wholly omitted (and with notation of "none") from its appropriate schedule, not per se concealment, In re Semmel, 9 A. B. R. 351, 118 Fed. 487 (D. C. Pa.).

3. Failure to schedule interest as beneficiary in life insurance policy pledged to the amount of its paid up value, attorney advising it to be worthless as asset, In re Blalock, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.).

4. Unexplained shrinkage in the bankrupt's assets of about \$12,000 within a year of his bankruptcy is insufficient proof that he had that amount of money at the time of filing his petition and concealed it from his creditors, In re Leslie, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.).

5. Sale of real estate for \$5,000: claimed to be worth now \$9,000: but purchaser put improvements upon it: also conflicting testimony as to present value: one witness testifying it is only worth now \$6,000 with all improvements, In re Harris, 11 A. B. R. 649 (Ref. N. Y.).

6. Fraudulent intent and knowledge not shown, *Smith v. Keegan*, 7 A. B. R. 4, 111 Fed. 157 (C. C. A. Mass.); In re Schofield, 17 A. B. R. 910, 15 A. B. R. 824 (D. C. Pa.).

7. Transfers complained of all occurring more than a year before bankruptcy, at a time when no present

debts existed; all being on record and freely testified to by bankrupt, *Fields v. Karter*, 8 A. B. R. 351, 115 Fed. 950 (C. C. A. Ala.).

8. No claim inserted in schedules for wages of bankrupt for services performed for his father on the farm, the bankrupt being sole heir and no agreement for wages existing; In re Howden, 7 A. B. R. 191, 111 Fed. 723 (D. C. N. Y.). This case, however, was decided as to the charge of a "false oath."

9. Conveying property to wife for full consideration, more than four months before bankruptcy, to raise money for the expenses of an impending lawsuit for breach of promise to marry, is no ground for denying discharge, In re Brumbaugh, 12 A. B. R. 204 (D. C. Penn.).

10. Fact that bankrupt, an only child and his wife resided upon his father's real estate is not sufficient to bar his discharge, it not appearing that the bankrupt made a clear misstatement with regard to the ownership of the real estate amounting to a concealment of assets or false oath, In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Penn.).

11. Shortage in value of stock largely due to loose and careless business methods and to a fire, necessitating fire loss sale below cost, held insufficient to sustain charge of concealment, the bankrupt denying concealment, In re Allendorf, 12 A. B. R. 320, 129 Fed. 981 (D. C. Iowa).

12. Equity in pledged stock not scheduled; nine shares of stock, retained by lender of money, on organization of new company, as security for the money loaned; bankrupt reports merely the remaining one share as owned by him, In re Conn, 6 A. B. R. 217, 108 Fed. 525 (D. C. Oregon).

13. The payment of a bona fide debt is not a concealment of assets, In re Covington, 6 A. B. R. 373, 110 Fed. 143 (D. C. N. Car.).

14. Discovery of microscopic germs of dishonesty to some creditors in making payment of debts is not sufficient ground to bar discharge, In re Covington, 6 A. B. R. 373, 110 Fed. 143 (D. C. N. Car.).

15. Failure to schedule property fraudulently conveyed many years before, no ground for barring discharge, In re Goodale, 6 A. B. R. 493, 100 Fed.

65 (D. C. N. Y.), the property being conveyed to wife in 1863 and 1875; In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.), in which case a desk was given away while the debtor was insolvent but before the passage of the Bankrupt Act.

16. Failure to schedule property fraudulently transferred more than four months prior to bankruptcy. In re Hennebry, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa).

17. Failure to schedule products of wife's separate property in Vermont, where the law of that state is that such products belong to the husband by virtue of his marital rights, he openly declaring all the time that the products are his wife's own, In re Marsh, 6 A. B. R. 537 (D. C. Vt.).

18. Undervaluing of property claimed as exempt is not per se concealment of it, In re Semmel, 9 A. B. R. 352, 118 Fed. 487 (D. C. Pa.).

19. Transfer to wife within four months, she being a creditor, In re Brown, 15 A. B. R. 350, 140 Fed. 383 (D. C. Vt.).

20. Concealment of assets by the agent or manager in charge of the bankrupt's business is not imputable to the bankrupt unless personally cognizant thereof, In re Meyers, 5 A. B. R. 4, 105 Fed. 353 (D. C. N. Y.).

21. Failure to schedule chose in action for wrongful death where bankrupt is beneficiary and settlement has been made for \$200 and where wife has lien thereon for funeral expenses advanced, In re Burnstine, 12 A. B. R. 596, 131 Fed. 828 (D. C. Mich.).

22. Alleged purchase in wife's name with bankrupt's money, not sustained, In re Tillyer, 17 A. B. R. 125 (D. C. Pa.).

23. Discrepancy between statement of financial condition prior to bankruptcy and in schedules, and as realized by trustee: evidence insufficient to show concealment, In re Boyden, 13 A. B. R. 269, 132 Fed. 991 (D. C. Pa.).

24. Failure, under advice of counsel, to schedule watch and chain worn openly on person, In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.).

25. Failure to schedule business owned by wife, and given her by another than her husband but "managed" by bankrupt. In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.); In re Freund, 3 A. B. R. 418, 98 Fed. 81 (D. C. N. Y.).

26. Failure to schedule articles of small value given away long before the passage of the Bankrupt Act although

probably recoverable by trustee because given when debtor insolvent, In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.).

27. Business of bankrupt levied on and sold under execution and also under mortgage bought in by judgment creditor and mortgagee for fair price, who employ bankrupt to manage it as agent and subsequently sell it for a fair price to bankrupt's wife, is not sufficient proof of continued ownership in bankrupt, in absence of showing wife paid for it with husband's funds, In re Locks, 5 A. B. R. 136, 104 Fed. 783 (D. C. N. Y.).

28. Failure to schedule part of month's salary as public officer earned but not due is not a bar, such salary not passing to creditors in Connecticut, In re Doherty, 13 A. B. R. 551, 135 Fed. 432 (D. C. Conn.).

29. Failure to schedule certain lands of which bankrupt had been dispossessed by order of the Government Land Office, the order being reversed after his discharge, is not concealment, especially in view of his having notified his counsel and the trustee as well of his rights, In re Hansen, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.).

30. Failure to schedule conditional and personal right of purchase is not concealment; such right is not an asset of the estate, In re Hansen, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.).

31. Failure to schedule interest under a will where counsel advised it was contingent and not vested and question is a close one, will not bar discharge, actual fraudulent intent being absent, Woods v. Little, 13 A. B. R. 742, 134 Fed. 229 (C. C. A. Penn.).

32. Withholding from trustee money earned since adjudication is not a bar, In re Polakoff, 1 A. B. R. 358 (Master's Report, affirmed by D. C. N. Y.).

33. Failure to schedule property transferred to mother on eve of bankruptcy under advice of counsel, the mother already holding a mortgage thereon and the equity of redemption being of uncertain value, In re Schreck, 1 A. B. R. 366 (Master's Report N. Y.).

34. Failure to disclose property bought with proceeds of surrender of life insurance policy where the life insurance policy was payable to wife is not a concealment, for the property was the wife's and not the bankrupt's, In re Dews, 2 A. B. R. 483, 96 Fed. 181 (D. C. R. I.).

35. Failure to schedule property fraudulently conveyed to wife where no secret trust is shown to have continued in bankrupt. In re Berner, 4

A. B. R. 383 (Ref. Ohio); In re Crenshaw, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.). See ante, § 2511.

36. Failure to schedule property—equity of redemption—alleged fraudulently transferred to sons but no secret trust appearing, In re Jacobs, 16 A. B. R. 483, 144 Fed. 868 (D. C. N. J.).

37. Failure to schedule property under honest belief that it does not belong to the bankrupt, is insufficient to bar discharge, In re Hirsch, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.).

38. Failure to schedule property under honest belief that it was practically valueless. In re Hirsch, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.); In re Blalock, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.), in which the property involved was an interest as beneficiary in a life insurance policy.

39. Failure to schedule property under honest mistake of law and fact, In re Morrow, 3 A. B. R. 263, 97 Fed. 574 (D. C. Calif.).

40. Denial of interest in business alleged to belong to wife in which bankrupts claim to be mere employees, no actual interest being traceable to bankrupts, In re Hirsch, 3 A. B. R. 344, 97 Fed. 571 (D. C. N. Y.).

41. Failure to schedule lease of house wherein bankrupt resides where the lease is for one year and is not shown to be worth more than its rent, is not sufficient to bar discharge, In re Hirsch, 3 A. B. R. 344, 97 Fed. 571 (D. C. N. Y.).

42. Failure of attorney at law to schedule written contracts for contingent fees where some of the cases are on the court calender and some are not, some are tried and some are on appeal, is not a bar. In re McAdam, 3 A. B. R. 417, 98 Fed. 409 (D. C. N. Y.). But it would hardly seem that all of the cases would come under the rule that uncompleted contracts for personal services are not assets passing to the trustee. Certainly the fees on cases that were already tried and not appealed from would not come under the rule, In re Freund, 3 A. B. R. 418, 98 Fed. 81 (D. C. N. Y.).

43. Acting under power of attorney as manager for wife of a business formerly owned by the bankrupt himself but on his previous failure conveyed by formal bill of sale to his wife in satisfaction of a debt owed by the bankrupt to his brother, the testimony uncontradicted, In re Freund, 3 A. B. R. 418, 98 Fed. 81 (D. C. N. Y.).

44. Omission from schedule of furniture bought for wife many years ago and presumably intended as a gift to her, In re Freund, 3 A. B. R. 418, 98

Fed. 81 (D. C. N. Y.).

45. Alleged transfer of stock to wife in payment of a debt shortly before bankruptcy the good faith of the debt not being questioned, In re DeLeeuw, 3 A. B. R. 418, 98 Fed. 408 (D. C. N. Y.).

46. Assigning stock to wife and placing same in box with her other papers, unknown to wife, In re Hedley, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.).

47. Wastefulness before failure, three years before bankruptcy, In re Phillips, 3 A. B. R. 542, 98 Fed. 844 (D. C. N. Y.).

48. Failure to schedule interest in father's estate where such interest by the will was left dependent upon the exercise of a power of appointment in the mother, In re Wetmore, 3 A. B. R. 700, 99 Fed. 703 (D. C. Pa.).

49. Managing business and property transferred to wife eleven years before the passage of the Bankruptcy Act, as wife's agent, the same opposing creditor having formerly been defeated in an attempt to have the conveyance declared fraudulent, In re McGurn, 4 A. B. R. 459, 102 Fed. 743 (D. C. Nev.).

50. Doing business as agent or manager for wife or other relative, the debtor contributing his services—without salary or other compensation than his living, having previously failed and lost everything, no part of the capital of the present business being his assets, labor alone having been contributed to the business, In re Fitchard, 4 A. B. R. 609, 103 Fed. 742 (D. C. N. Y.); In re Adams, 4 A. B. R. 696, 104 Fed. 72 (D. C. N. Y.).

51. Omission to schedule insurance policies pledged for more than their value, In re Adams, 4 A. B. R. 696, 104 Fed. 72 (D. C. N. Y.).

52. Even though possible equity given to wife, advice of counsel also existing, In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.).

53. Failure to schedule or to surrender homestead awarded as alimony to bankrupt wife after adjudication, is not a concealment of assets, In re LeClaire, 10 A. B. R. 733, 124 Fed. 654 (D. C. Iowa).

54. Failure to account for profits under contracts taken after adjudication, In re Parish, 10 A. B. R. 548, 122 Fed. 553 (D. C. Iowa).

55. Property concealed from former assignee or receiver to whom title to all property of the bankrupt had previously been conveyed does not constitute concealment from the subsequent trustee in bankruptcy, In re H.

SUBDIVISION "B."

"FALSE OATH" AS BAR TO DISCHARGE.

§ 2523. "False Oath" as Bar to Discharge.—If a bankrupt, knowingly and fraudulently, makes a false oath or account in, or in relation to, any proceeding in bankruptcy his discharge will be refused.⁶⁵

In re Troeder, 17 A. B. R. 731, 150 Fed. 710 (C. C. A. Mass.): "* * * and according to the practical construction of the Statute it is settled that the alleged false oath must contain all the elements involved in perjury at common law, namely an intentional untruth in a matter material to an issue which is itself material."

§ 2524. Must Be False Oath or False Account.—There must have been a false oath or a false account made by the bankrupt.⁶⁶

§ 2525. Oath Must Be Authorized by Statute and Administered by One Authorized.—And the oath must have been authorized by statute, and have been administered by one authorized to administer oaths.⁶⁷

§ 2526. Sufficient if Administered Either before Testifying or Afterwards.—It is sufficient if the bankrupt were sworn either before he began his testimony or afterwards when about to sign it.⁶⁸

§ 2527. Must Be in or in Relation to Bankruptcy Proceedings.—The false oath or account must have been in or in relation to his bank-

D. Berner, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.); obiter, In re Lesser, 8 A. B. R. 15, 114 Fed. 83 (C. C. A. N. Y., disapproving 5 A. B. R. 330).

56. Alleged concealment of earnings, In re Taylor, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.).

57. Acting as agent for wife under unrecorded power of attorney, and assigning corporate stock belonging to her as collateral and placing the same in a box with other papers belonging to her, though the wife had no actual knowledge of the assignment, held insufficient, In re Hedley, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.).

58. Bankrupt after involuntary petition filed against him but in ignorance thereof receiving \$110 for goods previously sold but duly entering them on cash book, no bar, though money could not thereafter be traced, In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.).

59. Bankrupt, paying pressing rent bill with money returned to him after adjudication by insurance company on lapse of tontine policy, on advice of counsel. Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.).

60. In re Irving Cohen, 30 A. B. R. 653, 201 Fed. 188 (D. C. N. Y., reversing S. C., 29 A. B. R. 698).

61. No presumption of disappearance where unable to show previous actual worth. In re Schwartz & Co., 28 A. B. R. 623 (Ref. N. Y.).

62. Where the only evidence is suspicion and conjecture arising from the bankrupt's expenditures of money and plans to organize a new company subsequent to bankruptcy insufficient to show concealment. In re Simon, 29 A. B. R. 808, 197 Fed. 102 (D. C. N. Y.).

63. Where after bankrupt's credit had been stopped he continued to wind up his business, selling for cash. In re Mintzer, 28 A. B. R. 743, 197 Fed. 647 (D. C. N. Y.).

65. Bankr. Act, §§ 14 (b) and 29 (b) (2); In re Sussman, 26 A. B. R. 18, 183 Fed. 331 (D. C. Pa.); In re Cantor, 26 A. B. R. 859 (Sp. M. N. Y.).

66. U. S. v. Wechsler, 16 A. B. R. 4 (D. C. N. Y., reversed, on other grounds, sub nom. Wechsler v. U. S., 19 A. B. R. 1, C. C. A.).

67. U. S. v. Wechsler, 16 A. B. R. 4 (D. C. N. Y., reversed, on other grounds, sub nom. Wechsler v. U. S., 19 A. B. R. 1, C. C. A.).

68. U. S. v. Wechsler, 16 A. B. R. 4 (D. C. N. Y., reversed, on other grounds, sub nom. Wechsler v. U. S., 19 A. B. R. 1, C. C. A.).

ruptcy proceedings; but it is sufficient to bar discharge if it were made in or in relation to any part of the bankruptcy proceedings.⁶⁹

Thus, a false oath upon the hearing upon the petition for adjudication in involuntary bankruptcy, is sufficient to bar.^{69a} But verification of an untrue answer to the petition has been held not to constitute a false oath where the answer was not filed in time nor considered.⁷⁰

False testimony given on the discharge hearing would be a bar,⁷¹ the only difficulty being that where the false oath was not given until after the specifications were filed, it would have to be brought into the specifications by supplemental pleading, which course might be open to objection. However, it is to be considered that the bankrupt, after entry of appearance in opposition to discharge and pending the ten days for the filing of specifications thereon, might be examined, for he is required to attend the hearing upon his petition for discharge for precisely such purpose. A false oath then committed doubtless could be incorporated in the specifications subsequently filed.

§ 2528. **"False Oaths" in Poverty Affidavits.**—Probably the false oath meant by the act would only cover cases in their nature such as to affect creditors' rights; therefore, mere false poverty affidavits to avoid prepayment of filing fees would probably not be a bar to discharge. One of the cases on the subject, however, avoided the point by holding the poverty affidavit was not false even though the bankrupt might have paid the filing fees out of his exempt property or have borrowed them from friends.⁷²

In another case, however, the bankrupt actually had \$37.50 in cash, nevertheless he not only made a poverty affidavit but also alleged in his schedules he had "no cash," for which false oath discharge was refused.⁷³

§ 2529. **"False Oath" in Hearing upon Petition for Adjudication.**—A "false oath" may be committed by false swearing upon the hearing on the petition for adjudication of bankruptcy.⁷⁴

But the verification of an untrue answer was held not to constitute a false oath where the answer was not filed in time nor considered.⁷⁵

§ 2530. **If Not in, nor in Relation to His Own Bankruptcy Proceedings, No Bar.**—The commission of a false oath or account in another court, or in relation to another's bankruptcy, is not sufficient to bar discharge.

Thus, where, upon objections to discharge, the stenographer's notes of

69. In re Walter W. Chamberlain, 25 A. B. R. 37, 180 Fed. 304 (D. C. N. Y.).

69a. In re Luftig, 15 A. B. R. 773, 162 Fed. 322 (D. C. Mass.).

70. In re Young, 15 A. B. R. 477, 140 Fed. 728 (D. C. N. Car.).

71. Edelstein v. U. S., 17 A. B. R. 656, 149 Fed. 636 (C. C. A. Minn.).

72. Sellers v. Bell, 2 A. B. R. 529, 94 Fed. 801 (C. C. A. Ala.).

73. In re Roy, 3 A. B. R. 37, 96 Fed. 400 (D. C. Vt.).

74. Instance, In re Luftig, 15 A. B. R. 778, 162 Fed. 322 (D. C. Mass.).

75. In re Young, 15 A. B. R. 477, 140 Fed. 728 (D. C. N. C.).

the bankrupt's former testimony at a creditors' meeting in the common pleas court in 1889 under the Pennsylvania Insolvency Act were introduced by stipulation between counsel, "to have the same force and effect as if the said testimony was originally taken before the referee in this proceeding," the court held, that statements contained in such notes could not be used to base a charge of false oath under § 29, because the bankrupt took no oath before the referee that his former testimony was true, and he can not be bound by his counsel's stipulation so far as to base a prosecution for perjury against him.⁷⁶ Likewise, a false oath made by the bankrupt in another bankruptcy proceedings than his own, is not ground for refusing discharge.⁷⁷

§ 2531. Whether False Oath in Own Previous Bankruptcy Proceedings, Bar.—It is a question whether the bankrupt's false oath in a former bankruptcy proceedings of his own, is sufficient. One case suggests that perhaps it must have been committed in the very bankruptcy proceedings then pending, and that a false oath in a former proceedings will not bar.

Compare, *quære*, *obiter*, *In re Feigenbaum*, 9 A. B. R. 597, 121 Fed. 69 (C. C. A. N. Y.): "We have proceeded upon the assumption that in the present proceeding the creditors can avail themselves of the same objections interposed in the former proceeding and sustained there. If for technical reasons or otherwise they are prevented from doing this, the iniquity of this attempt to procure a discharge is still more apparent. It is the contention of the bankrupt's counsel that this is an entirely new and distinct proceeding and in this view he is undoubtedly correct.

"Can the misconduct of the bankrupt in the former proceeding be imported into this proceeding? Suppose the creditors should again interpose the objection that the bankrupt has 'knowingly and fraudulently concealed while a bankrupt * * * from his trustee property belonging to his estate,' can they prove the allegation by showing that he has been guilty of this misconduct in some former bankruptcy? Does not the statute refer to the pending proceeding and the trustee then in esse? If so, it will be at once apparent that the creditors may, in many instances, be remediless and the second petition may be used to consummate the most glaring frauds."

However, the wording of the statute does not require the construction that the false oath is only available as a bar when made in the same proceedings. It expressly says "in or in relation to *any* proceedings in bankruptcy." Moreover, such construction might prevent a former refusal of discharge on the ground of a false oath then committed, being urged by the same creditor to bar his discharge now.⁷⁸

§ 2532. False Oath in Bankruptcy Proceedings under Law of 1867 Not Sufficient.—The commission of a false oath under the law

^{76.} *In re Goldsmith*, 4 A. B. R. 234, 101 Fed. 570 (D. C. Penn.).

^{77.} *In re Blalock*, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.).

^{78.} Compare discussion, *ante*, division 3, §§ 2480, 2571.

of 1867, however, though in his own bankruptcy, would not be a bar under the present law.⁷⁹

§ 2533. Must Have Been Material.—The false oath or account must have been material.⁸⁰ Mere false swearing, unless concerning matters that would naturally be material to the discovery of assets, the history of the bankrupt's business doings and relations, the existence and disposition of his property and debts, etc., would not be sufficient to bar a discharge.⁸¹

§ 2534. Material, Though Subject of Little Value, or Exempt, or Not Recoverable.—The fact that the matters about which the bankrupt swears falsely are of little value does not deprive the oath of its materiality.⁸² The creditors are entitled to know the facts, whether of advantage to them or not. It is material if it concerns the act, conduct or property of the bankrupt in his business relations.

§ 2535. False Oath Must Be "Knowingly and Fraudulently" Made.—The false oath or account must have been made "knowingly and fraudulently."⁸³

In *re Eaton*, 6 A. B. R. 534, 110 Fed. 731 (D. C. N. Y.): "Assuming that all the testimony offered by the objecting creditor is competent, he has failed to establish the essential ingredients of the offense, namely, that the omission was made knowingly and fraudulently."

"Fraudulently" in this connection implies not only wilful intent, but also materiality. The oath must not only be known to be untrue and intended to deceive, but also must have been intended to mislead as to some fact

^{79.} In *re Herrman*, 4 A. B. R. 136, 102 Fed. 753 (D. C. N. Y.).

^{80.} In *re Walter W. Chamberlain*, 25 A. B. R. 37, 180 Fed. 304 (D. C. N. Y.).

^{81.} *U. S. v. Wechsler*, 16 A. B. R. 5 (D. C. N. Y., reversed, on other grounds, sub nom. *Wechsler v. U. S.*, 19 A. B. R. 1, C. C. A.); *Bauman v. Feist*, 5 A. B. R. 703, 107 Fed. 83 (C. C. A. Iowa); In *re Troeder*, 17 A. B. R. 731, 150 Fed. 710 (C. C. A. Mass.).

^{82.} In *re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.), quoted at § 2541.

^{83.} **Foreigner's lack of acquaintance with English language to be taken into account:** The fact that the bankrupt is a foreigner, not well acquainted with the English language, may be taken into account. *U. S. v. Wechsler*, 16 A. B. R. 17 (D. C. N. Y., reversed, on other grounds, sub nom. *Wechsler v. U. S.*, 19 A. B. R. 1, C. C. A.).

Kentucky National Bank of Louisville v. Carley, 12 A. B. R. 119 (C. C. A. N. J.); In *re Patterson*, 10 A. B. R.

371, 121 Fed. 921 (D. C. N. Y.); In *re Beebe*, 8 A. B. R. 597, 116 Fed. 48 (D. C. Penn.); In *re Blalock*, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.); In *re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.); In *re Bryant*, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.): "Not knowingly or fraudulently." In *re Crenshaw*, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.); In *re Hirsch*, 3 A. B. R. 344, 96 Fed. 468 (D. C. N. Y.); In *re Freund*, 3 A. B. R. 418, 98 Fed. 81 (D. C. N. Y.); In *re Osborne*, 8 A. B. R. 165, 115 Fed. 1 (C. C. A. Mass.); *Smith v. Keegan*, 7 A. B. R. 4, 111 Fed. 157 (C. C. A. Mass.); In *re Troeder*, 17 A. B. R. 731, 150 Fed. 710 (C. C. A. Mass.); In *re Hall*, 31 A. B. R. 88, — Fed. — (D. C. N. Mex.); In *re Shear*, 29 A. B. R. 688, 201 Fed. 460 (D. C. N. Y.); In *re Doyle*, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.); In *re Marcus & Scherr*, 27 A. B. R. 164, 192 Fed. 743 (D. C. N. Y.); In *re Mayer*, 28 A. B. R. 342, 195 Fed. 571 (D. C. N. Y.). Compare, In *re Marcus*, 30 A. B. R. 176, 203 Fed. 29 (C. C. A. N. Y.).

material for creditors to know. The word "knowingly" however, would seem superfluous since "false" itself implies knowledge of the untruthfulness of the statement, a mistaken oath not being strictly a "false" oath.⁸⁴

"False oath" is the same as perjury.⁸⁵

§ 2536. Advice of Counsel to Negative Fraudulent Intent.—Advice of counsel tends to negative fraudulent intent.⁸⁶ But the bankrupt must have fully and frankly disclosed to his counsel the facts within his knowledge, and have acted on his opinion, else advice of counsel will be neither excuse nor justification.⁸⁷

§ 2537. Fraudulent Intent Not Necessarily Negated by Fact That Property Not Recoverable.—Fraudulent intent is not necessarily negated by the fact that the property involved did not belong to creditors, nor that it could not be recovered for their benefit, as that its transfer could not, for lapse of time, be now questioned.

In *re Conroy*, 14 A. B. R. 251, 134 Fed. 764 (D. C. Penn.): "Whether this Clifford street property can now be administered by the bankrupt's estate is not the test as to the materiality of an inquiry into its ownership by creditors. The ownership of the property was a proper, legitimate and material matter of inquiry in this bankruptcy proceeding. If the property belonged to Conroy at this time, the creditors were entitled to that information; and the original ownership of the property, and the circumstances under which it passed out of his possession were such that they were entitled to know the exact facts as to whether or not he was originally the owner, and when and how and under what circumstances it became the property of his wife; and, in this inquiry, if he fraudulently and knowingly made a false oath in regard to the ownership of the property at any time, he committed an offense punishable by imprisonment under the Act, and therefore sufficient to prevent a discharge. In *re Gaylord*, 7 Am. B. R. 1, 112 Fed. 668, 50 C. C. A. 415."

§ 2538. Nor That Its Value Unascertained.—Nor is fraudulent intent negated by the fact that the property involved was of unascertained value.⁸⁸

In *re Becker*, 5 A. B. R. 441, 106 Fed. 54 (D. C. N. Y.): "His schedules show no assets of any kind. His interest in these policies was the only property he

⁸⁴. Impliedly, In *re Marcus*, 30 A. B. R. 176, 203 Fed. 29 (C. C. A. N. Y.).

⁸⁵. Inferentially, *Wechsler v. United States*, 19 A. B. R. 1, 158 Fed. 579 (C. C. A. N. Y.). In *re Troeder*, 17 A. B. R. 731, 150 Fed. 710 (C. C. A. Mass.), quoted at § 2523; *Epstein v. U. S.*, 28 A. B. R. 561, 196 Fed. 354 (C. C. A. Ills.). Compare ante, §§ 2325 and 2327.

⁸⁶. See similar proposition relative to "Concealment of Assets as Bar to Discharge," ante, § 2491, and cases cited. In *re Blalock*, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.); In *re Bry-*

ant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.). Compare, as to scope of advice, *McNiel v. U. S.*, 18 A. B. R. 21 (C. C. A. Tex.). In *re Cuthbertson*, 29 A. B. R. 823, 202 Fed. 266 (D. C. S. D.).

⁸⁷. In *re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.), quoted at § 2492.

⁸⁸. Compare, analogously (concealment of assets), In *re Wood*, 3 A. B. R. 572, 98 Fed. 972 (D. C. N. Y.). See, In *re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.), quoted at § 2539½.

owned. If he outlived the tontine period of 20 years the surrender value was due to him and not to his wife. Upon two of the policies he could realize in two and three years respectively. To find that he did not know of the existence of this interest is to assume that he was deficient in the most rudimentary mental processes. The fact that the amount was not then ascertained is immaterial, as it was his duty to schedule all his property. Bankr. Act, § 7 (a) (8). That he failed to report these policies is conceded, that he did this knowingly cannot be successfully disputed and that he has since resisted the trustee in his efforts to realize upon the policies is established beyond question. The inevitable conclusion would seem to follow that the concealment was with the intent to prevent the property from reaching his creditors. The omission knowingly of property from the schedules and the verification thereof constitutes a false oath within the meaning of § 29b (2) of the act."

§ 2539. Nor That It Might Have Been Claimed Exempt.—Nor is fraudulent intent necessarily negated by the fact that the property involved would have been exempt anyway.⁸⁹

§ 2539½. But Is Evidence Toward Negating Intent.—But that the property involved could not be recovered for creditors, or that the bankrupt's rights thereto were dubious, or that it might have been claimed as exempt (if such rights were known to the bankrupt), or that it was of little value,⁹⁰ are facts entitled to weight in determining whether the false oath was with fraudulent intent.⁹¹

In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.): "But if certain interests in the estate of the bankrupt's father should have been included in the schedule of assets, it does not necessarily follow that the bankrupt knowingly and fraudulently made a false oath when he verified the schedule which did not mention them. It was not obvious what interests belonged to the bankrupt or that they were transferable. Moreover, as we have pointed out, the bankrupt claims that he did not own those interests. Informality in the conveyance and its delivery might have rendered it illegal, and still not affect the bankrupt's good faith. That but very little income had ever been received did not affect the character of the interests as property, but did have a bearing upon the bankrupt's fraudulent intent. Taking into consideration all the testimony and all the circumstances, we cannot say that the creditor has clearly shown that the bankrupt fraudulently and knowingly made a false oath in not referring in his schedule to his interest in his father's estate."

In re Eaton, 6 A. B. R. 531, 110 Fed. 733 (D. C. N. Y.): "There is nothing to show the value of the stock * * * when the schedules were filed. It may have become utterly worthless at that time. It had been transferred to a trustee who was authorized to sell it to satisfy unpaid assessments. A receiver had been appointed of all the bankrupt's property including the stock. * * * In these circumstances a perfectly honest man might have thought that the stock was of no value and have forgotten to mention it in his schedules."

⁸⁹. In re Royal, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.). Compare, analogously as to concealment of assets, ante, § 2493.

⁹⁰. In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

⁹¹. In re Todd, 7 A. B. R. 770, 112 Fed. 315 (D. C. Vt.); In re Hirsch, 3 A. B. R. 344, 96 Fed. 468 (D. C. N. Y.).

§ 2540. False Testimony on "General Examination," "False Oath."—False testimony of the bankrupt taken on his general examination constitutes a "false oath" and may be proved against him in bar of his discharge,⁹² whether the examination itself might or might not be introduced against him in any criminal prosecution.⁹³

But false testimony of the bankrupt before a state court, introduced in bankruptcy proceedings under stipulation of counsel that it should be considered to be his testimony, but not sworn to by the bankrupt in the bankruptcy proceedings, is not a false oath barring discharge.⁹⁴

§ 2541. Swearing to Schedules Containing Misstatements or Omissions, "False Oath."—A "false oath" may be perpetrated by making oath to schedules, from which material omissions or misstatements have been made, knowingly and fraudulently.⁹⁵

^{92.} *Wechsler v. U. S.*, 19 A. B. R. 1 (C. C. A. N. Y., affirming, on this point, though reversing on other, *U. S. v. Wechsler*, 16 A. B. R. 1); *U. S. v. Wechsler*, 16 A. B. R. 1 (D. C. N. Y., reversed, on other grounds, sub nom. *Wechsler v. U. S.*, 19 A. B. R. 1. C. C. A.).

Instances: (As to doing business in wife's name), *In re Lowenstein*, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y.); held insufficient to prove "false oath," *Bauman v. Feist*, 5 A. B. R. 703, 107 Fed. 83 (C. C. A. Iowa); instance, held insufficient, *In re Cohen*, 18 A. B. R. 84 (D. C. N. Y.).

^{93.} See general subject of "Bankrupt's Testimony," ante, § 1556, et seq. Also, § 2324.

^{94.} *In re Goldsmith*, 4 A. B. R. 234, 101 Fed. 570 (D. C. Pa.).

^{95.} The following are instances where facts have been held sufficient to prove a "false oath" by omissions from schedules:

1. Interest in land not scheduled under the excuse that no real interest was conveyed, although the bankrupt had acted and received the benefits like a real owner and had even succeeded in borrowing money on it and had warranted title thereto in so doing, *In re Gailey*, 11 A. B. R. 539, 127 Fed. 538 (C. C. A. Ills.): "A voluntary bankrupt is required by § 7a (8) to prepare, make oath to and file with his petition 'a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any.' The plain pur-

pose of the law is that one seeking the benefit of a discharge under the act shall turn over to his creditors all his property of every kind and nature, except such as is exempt by law. This is the condition of a discharge from debt. The bankrupt must also give a sworn list of creditors, with the nature and amount of the debt due each, and the particulars of any security held by them. The form of the schedules of property prepared by the Supreme Court, and to be annexed to the petition, covers property in reversion, remainder or expectancy, including property held in trust for the debtor, or subject to any power or right to dispose of or charge including a particular statement of property which had been conveyed for the benefit of creditors. The court, supplementing the provisions of the act, has been careful to require that every interest in land held by the debtor and every security held by the creditor shall be stated, to the end that the entire property of the debtor, save such as is exempt by law, shall be subjected to the payment of debts; and that the status of each creditor with respect to his claim shall be exhibited, that there may be an equal and just disposition of the estate. These provisions are not merely formal. They are of the essence of the law, in prevention of fraud, and in aid of equitable division of the estate. The making of a false oath or account in, or in relation to any proceeding in, bankruptcy, is punishable by imprisonment, and is sufficient cause for the refusal of discharge from the indebtedness. It was well observed by Brown, district judge, *In re Baudouine* (D. C.), 3 Am. B. R. 55, 90 Fed. 536, 539, 'that a discharge in

In re Eaton, 6 A. B. R. 531, 110 Fed. 731 (D. C. N. Y.): "There can be no doubt that the verification of schedules from which valuable property has been knowingly omitted constitutes a false oath under § 29b (2) of the act, but the omission must have been made with fraudulent intent."

In re Becker, 5 A. B. R. 441, 106 Fed. 54 (D. C. N. Y.): "The omission

bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would be not only a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy."

2. Schedules of assets as to "Cash on hand" alleging "None" the bankrupt actually having \$37.50 cash, In re Roy, 3 A. B. R. 37, 96 Fed. 400 (D. C. Vt.).

3. Omitting moneys in bank from schedules, In re Otto, 8 A. B. R. 753, 115 Fed. 860 (Ref. N. J., affirmed in 8 A. B. R. 305); In re Royal, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.). Although claimable as exempt, In re Royal, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.).

4. Omitting payments to attorneys, In re Lewin, 4 A. B. R. 636, 103 Fed. 852 (D. C. Vt.).

5. Omitting devise from grandfather, In re Breiner, 11 A. B. R. 684, 129 Fed. 155 (D. C. Iowa).

6. Omitting property fraudulently conveyed by way of voluntary gift to wife more than four months before bankruptcy, In re Toothaker Bros., 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.); In re Gammon, 6 A. B. R. 182, 109 Fed. 312 (D. C. Iowa).

7. Unexplained shrinkage of assets: Debts to relatives omitted from financial statements to mercantile agencies: Large purchases but nothing paid thereon. Illiterate bankrupt swearing in his schedules that he has no property except such as is exempt, whereas comparison of purchases and sales and moneys paid on purchases demonstrates presence of large assets: shrinkage unsatisfactorily explained: debts to relatives now alleged not shown in former financial statements to mercantile agency: chattel mortgage to raise money to pay creditors, but creditors not paid, In re Grossman, 6 A. B. R. 510, 111 Fed. 507 (D. C. Mich.).

8. Swearing "None" as to "Stock in Incorporated Companies" but nevertheless claiming five shares as exempt, and in reality having ten shares, In re Semmel, 9 A. B. R. 351, 118 Fed. 487 (D. C. Pa.).

9. Swearing he does not know whereabouts of books of account when had previously to passage of the Bank-

ruptcy Act, sent the books to a creditor with declaration he would swear he did not know their whereabouts if examined in supplementary proceedings, In re Kamsler, 2 N. B. N. & R. 97 (Ref. N. Y.).

10. Omitting tonine policy, payable to bankrupt if he survive a certain period, although amount thereof not exactly ascertainable, In re Becker, 5 A. B. R. 438, 106 Fed. 54 (D. C. N. Y.).

11. Omitting own business although ostensibly wife's business, In re Lowenstein, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y.).

12. Omitting large sum of money received a few days before bankruptcy and alleged to have been stolen from drawer in roll-top desk, Barton Bros. v. Produce Co., 14 A. B. R. 502, 136 Fed. 355 (C. C. A. Ark.).

13. Omitting real estate equities placed in wife's name and never in bankrupt's own name, In re Guilbert, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.).

14. Omitting concealed merchandise, In re Goodman, 22 A. B. R. 570, 171 Fed. 287 (D. C. Pa.).

15. Omitting to schedule interest in corporate stock, though defending against adjudication on ground that he is not insolvent without mentioning stock, and after adjudication bringing suit to recover stock from pledgee, In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

16. Omission of property transferred more than four months prior to bankruptcy, not shown to have been intentionally and willfully false. In re Henneby, 31 A. B. R. 231, 267 Fed. 882 (D. C. Iowa).

17. Omitting from schedules property held by corporation which existed merely as cloak for bankrupt, In re Berger, 29 A. B. R. 712, 200 Fed. 325 (D. C. N. Y.).

18. Omitting insurance policies. In re Sussman, 26 A. B. R. 18, 190 Fed. 111 (D. C. Pa.).

The Following are Instances Where the Facts Have Been Held Insufficient to Prove a "False Oath" by Omissions from Schedules:

1. Small debt of \$7.76 owed to bankrupt omitted from schedules but no fraudulent intent proved. In re Miner,

knowingly of property from the schedules and the verification thereof constitutes a false oath within the meaning of § 29b (2) of the act."

Obiter, In re Wolfensohn, 5 A. B. R. 60 (Special Master N. Y.): "If the bankrupt willfully omitted from his schedules any property which he should have disclosed, he certainly makes a false oath."

In re Guilbert, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.): "And further, the

8 A. B. R. 248, 114 Fed. 988 (D. C. Ore.).

2. Material omissions but not fraudulently made, In re Eaton, 6 A. B. R. 534, 110 Fed. 731 (D. C. N. Y.); In re Schofield, 17 A. B. R. 916, 15 A. B. R. 824 (D. C. Pa.).

3. Omitting from schedules corporate stock held in wife's name but claimed to be on secret trust for bankrupt, but evidence not conclusive, *Fellow v. Freudenthal*, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.).

4. Omission of property alleged to have been fraudulently levied on two years before passage of the Bankruptcy Act, In re Webb, 3 A. B. R. 386, 98 Fed. 404 (D. C. N. Y.).

5. Omission of property alleged to have been fraudulently conveyed before passage of Bankruptcy Act, no secret trust being shown, In re Dauchy, 11 A. B. R. 511, 130 Fed. 532 (C. C. A. N. Y.).

6. Policy of life insurance on bankrupt's life but payable to another, he having no interest therein, In re Rauchenplat, 9 A. B. R. 764, 1 P. R. 471 (D. C. Porto Rico).

7. Policy of life insurance on which only one premium paid, omitted from schedule, In re Miner, 8 A. B. R. 248, 114 Fed. 988 (D. C. Ore.).

8. Failure specifically to enumerate exempt property, simply scheduling it as "exempt wearing apparel," without giving items; a watch even being held properly exempt, *Sellers v. Bell*, 2 A. B. R. 529, 94 Fed. 801 (C. C. A. Ala.).

9. Understatements and overstatements of debts owing to bankrupt about counterbalancing, negative fraudulent intent, In re Miner, 8 A. B. R. 248, 114 Fed. 988 (D. C. Ore.).

10. Land contract, on which only about the interest had been paid, forfeitable for such default at option of seller, omitted from schedule, In re Miner, 8 A. B. R. 248, 114 Fed. 988 (D. C. Ore.).

11. Swearing "None" as to "Stock in Incorporated Companies" but nevertheless in Schedule "B (5)," claiming same as exempt, not false oath as to shares in Schedule "B (5)," although false oath as to other shares nowhere reported, In re Semmel, 9 A. B. R. 351, 118 Fed. 487 (D. C. Pa.).

12. Omission of any claim for wages for bankrupt's services on his father's farm where bankrupt was his father's sole heir and no agreement for wages existed, In re Howden, 7 A. B. R. 191, 111 Fed. 723 (D. C. N. Y.).

13. Mere failure to schedule a debt and certain real estate of uncertain value is not of itself evidence of fraudulent intent, In re Neely, 12 A. B. R. 407, 134 Fed. 667 (Ref. N. Y.).

14. Equity in lumber sold not scheduled, In re Hamilton, 13 A. B. R. 233, 133 Fed. 823 (D. C. N. Y.).

15. Oath to schedules where watch and chain worn openly on person were omitted on advice of counsel, In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.).

16. Oath to schedules omitting partnership interest given by father-in-law to wife of bankrupt but managed by bankrupt, In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.).

17. Oath to schedules omitting desk given away before passage of Bankruptcy Act, In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.).

18. Oath to schedules omitting voluntary conveyance to mother of land on which she held a large mortgage, the conveyance being made on advice of counsel, In re Schreck, 1 A. B. R. 366 (Ref. N. Y.).

19. Oath to schedules omitting voluntary conveyance to wife four months and one week before bankruptcy, no secret trust being shown to continue, In re Crenshaw, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.).

20. Oath to schedule omitting lease of house which bankrupt is occupying as tenant where the lease is only for a year and is not shown to have any value beyond its rent, could not be held to be intentional nor fraudulent false oath, In re Hirsch, 3 A. B. R. 344 (D. C. N. Y.).

21. Denial of interest in business alleged to belong to bankrupt's wife in which bankrupt alleges he is simply an employee where no actual interest is traced into it, In re Hirsch, 3 A. B. R. 344, 97 Fed. 571 (D. C. N. Y.).

22. Attorney at law failing to schedule written contracts for contingent fees where some of the cases are on the court calendar and some

seventh specification charges the bankrupt with having committed an offence punishable by imprisonment in having made a false oath to his schedule of assets in his petition in bankruptcy in not having included his interest in these properties. However small the value of the equities in these properties was at the time of the filing of the petition, if they belonged to the bankrupt, it was his duty to schedule them as an asset. Having failed to do so, he could not truthfully swear that he had included all his property in the schedule, and in making such an affidavit he is guilty of having made an oath to a false statement."

But, of course, mere failure to schedule assets is not per se a fraudulent and knowing false oath.

§ 2542. Omitting Creditors from Schedules, or Giving Untrue Liabilities When False Oath.—A false oath may be perpetrated by swearing to schedules in which false statements of liabilities have been purposely made.⁹⁶

Thus, a "fraudulently and knowingly" made "false oath" may be perpetrated by a bankrupt swearing in his schedules to fictitious debts alleged to be owing by him to relatives or friends.⁹⁷

But where no advantage could possibly accrue to the bankrupt, a fraudulent intent in omitting creditors or misstating liabilities will be negatived.⁹⁸

Compare, *In re Miner*, 9 A. B. R. 102, 117 Fed. 953 (D. C. Ore.); *S. C.*, 8 A. B. R. 248, 114 Fed. 998 (D. C. Ore.): "There could be no adequate motive

are not, some are tried and some are on appeal the doubt as to their being assets of the estate taking away any certainty that they were omitted "knowingly and fraudulently," *In re McAdam*, 3 A. B. R. 417, 98 Fed. 409 (D. C. N. Y.).

23. Omitting household furniture bought for wife many years ago and presumably intended as a gift to her, *In re Freund*, 3 A. B. R. 418, 98 Fed. 81 (D. C. N. Y.).

24. Omitting list of names said to belong to mail order corporation, *Vehon v. Ullman*, 17 A. B. R. 435 (C. C. A. Ills.).

25. Omitting interest, in decedent's estate where the bankrupt's rights therein were doubtful or involved, *In re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

26. Failing to schedule \$861 in cash and nine head of cattle, whilst stating in schedules that he possessed only \$10 in cash, such cash and cattle being subsequently discovered and brought into the estate by trustee. *In re Napier*, 23 A. B. R. 560 (Spec. Master Ky., affirmed by D. C.).

96. *In re Gross*, 5 A. B. R. 271 (Ref. N. Y., affirmed by D. C.); *In re Young*,

15 A. B. R. 477, 140 Fed. 728 (D. C. N. Car.).

97. But compare, contra, where omission not purposely made, *In re Blalock*, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.): "The grounds for refusal to discharge under the present Bankrupt Law are limited in number. They specify what shall be the causes for such refusal, and the omission of creditors from the schedules is not enumerated as one of the grounds. There is nothing of substance in the specification." *In re Kamsler*, 2 N. B. N. & R. 97 (Ref. N. Y.).

98. The following are further instances of failure to prove fraudulent intent in making a "false oath" by misstatements or omissions of debts owing by the bankrupt:

1. Scheduling of an assigned judgment as being owed to the original judgment creditor although the bankrupt knew of the assignment is not sufficient to bar discharge, *Sellers v. Bell*, 2 A. B. R. 529, 94 Fed. 801 (C. C. A. Ala.).

2. Failure to schedule money borrowed of friend to pay attorney's fees and costs of bankruptcy, is not a "false oath," *Sellers v. Bell*, 2 A. B. R. 529, 94 Fed. 801 (C. C. A. Ala.).

in concealing obligations which the bankrupt owed. This could not smooth his way through bankruptcy, and would, if the deception was successful, prevent his discharge as to the omitted creditors. Moreover, a debt, however scheduled, would necessarily be proved at the amount actually due. No possible advantage could be gained by misstating the amount of the debt listed, and there is nothing in the facts stated to warrant an inference of bad faith against the bankrupt."

Compare, *In re Crenshaw*, 2 A. B. R. 623, 95 Fed. 632 (D. C. Ala.): "The omission from the schedule of one of the notes due Findlay, Dicks & Co. was doubtless an oversight or mistake. From the facts and circumstances, I can see no motive for omitting it and no benefit to be derived by the bankrupt from such omission."

§ 2543. Amendment after Discovery of Omissions.—Amendment of the schedules after discovery of the omission is ineffectual to excuse the omission where the original omission was fraudulent;⁹⁹ but a prompt acknowledgment of the omission as a mistake is a circumstance tending to rebut bad faith.¹

SUBDIVISION "C."

DESTRUCTION, FAILURE TO KEEP AND CONCEALMENT OF BOOKS OF ACCOUNT AS BAR TO DISCHARGE.

§ 2544. Destruction, Failure to Keep and Concealment of Books of Account as Bar to Discharge.—The bankrupt's discharge will be barred if, with intent to conceal his financial condition, he has destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained.²

⁹⁹. Compare ante, § 2520. Also see *In re Gross*, 5 A. B. R. 271 (D. C. N. Y.); *In re Breiner*, 11 A. B. R. 684, 129 Fed. 155 (D. C. Iowa); *In re Eaton*, 6 A. B. R. 531, 110 Fed. 731 (D. C. N. Y.); *In re Sussman*, 26 A. B. R. 18, 190 Fed. 111 (D. C. Pa.).

Kern v. United States, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.): "After he returned from Canada, the bankrupt by leave of the court filed an amended schedule of assets which included those he is charged with having concealed, and counsel argues that this related back to his original schedule, and operated as an atonement which, being made while the proceedings were yet in progress, redeemed his fault, so that in the end nothing was concealed from the trustee. But we are unable to agree that it would have such an effect. The offenses of false swearing and concealment when once committed could not be retrieved by right and lawful conduct and the doing of things 'meet for repentance,' however they might

affect the judgment of the court in imposing sentence."

¹. *In re Eaton*, 6 A. B. R. 531, 110 Fed. 731 (D. C. N. Y.).

². Bankr. Act, § 14 (b) (2); *Godshalk v. Sterling*, 12 A. B. R. 302, 129 Fed. 580 (C. C. A. Penn.); *In re Goldich*, 21 A. B. R. 249, 164 Fed. 82 (D. C. Pa.); *In re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.); *In re Hirshowitz*, 27 A. B. R. 701, 194 Fed. 562 (D. C. Pa.); *In re Graves*, 26 A. B. R. 633, 189 Fed. 847 (D. C. Pa.); *In re Bradin*, 24 A. B. R. 793, 179 Fed. 768 (D. C. Pa.).

In re Feldstein, 6 A. B. R. 458 (D. C. N. Y.): This was a case that occurred before the amendment of 1903, but, being a case where the discharge was refused when the statute was much more liberal towards the bankrupt in relation to his keeping of books than it is now, it is an authority since the amendment as well.

Ablowich v. Stursburg, 5 A. B. R. 403, 105 Fed. 751 (C. C. A. N. Y.).

"In Contemplation of Bankruptcy"

§ 2545. Intent to Conceal Financial Condition Essential.—The bankrupt's intent to conceal his financial condition thereby must be shown.

Mere failure to keep books or to keep them properly will not bar the discharge unless done with intent to conceal his financial condition.³

In *re Weston*, 30 A. B. R. 647, 206 Fed. 281 (C. C. A. N. Y.): "While the act does not expressly require books or records to be kept, it denies a discharge

and "with Fraudulent" Intent, before the Amendment of 1903.—1. Before the amendment of 1903, it must also have been done "in contemplation of bankruptcy." In *re Feldstein*, 8 A. B. R. 160, 115 Fed. 259 (C. C. A. N. Y.); *Van Ingen v. Schophofen*, 12 A. B. R. 24, 129 Fed. 352 (C. C. A. Mo.); In *re Shorer*, 2 A. B. R. 165, 96 Fed. 90 (D. C. Conn.); In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa); In *re Holtz*, 1 N. B. N. 204.

2. And with "fraudulent" intent to conceal his "true" financial condition. In *re Spear*, 4 A. B. R. 617, 103 Fed. 779 (D. C. Vt.); In *re Boasberg*, 1 A. B. R. 353 (Special Master N. Y.); In *re Polakoff*, 1 A. B. R. 358 (Master's Report, affirmed by D. C. N. Y.); In *re Feldstein*, 8 A. B. R. 160, 115 Fed. 259 (C. C. A. N. Y.); In *re Mackenzie*, 12 A. B. R. 605, 132 Fed. 114 (D. C. Conn.); In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa); In *re Cohn*, 1 A. B. R. 655 (Ref. Mo.); In *re McNamara*, 2 A. B. R. 566 (Ref. N. Y.).

3. The weight of authority was that the proof must show a contemplation of bankruptcy proceedings being instituted: and that it was not sufficient if there was merely proof of a contemplation of such condition of finances as naturally would lead to bankruptcy. In *re Boasberg*, 1 A. B. R. 353 (Special Master, N. Y.); In *re Polakoff*, 1 A. B. R. 358 (Special Master, affirmed by D. C.); In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

In *re Hirsch*, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.): And that it should be done after the passage of the Act and not simply during the pendency of the bill. In *re Marx*, 4 A. B. R. 521, 102 Fed. 676 (D. C. Ky.).

In *re Morgan*, 4 A. B. R. 402, 101 Fed. 982 (D. C. Ark.): "An act in 'contemplation of bankruptcy' must contemplate the commission of what is declared by the act to be an act of bankruptcy, or an application of a bankrupt to be declared a bankrupt." In *re Carmichael*, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa); In *re Lieber*, 3 A. B. R. 217 (Special Master, Pa.); *obiter*, In *re Shertzer*, 3 A. B. R. 699

(D. C. Pa.); In *re Stark*, 1 A. B. R. 180, 96 Fed. 88 (Ref. N. Y., since created district judge). Also see *Van Ingen v. Schophofen*, 12 A. B. R. 24, 129 Fed. 352 (C. C. A. Mo.).

Further Instances of "Fraudulent Intent" and "Contemplation of Bankruptcy" before the Amendment of 1903.

1. Bankrupt selling out business, owing \$6,000; then without paying the indebtedness, going into business in another place, buying on credit \$6,000 worth of goods and using only \$500 in cash, his books failing to show entries thereof; then going into bankruptcy. In *re Kenyon*, 7 A. B. R. 257, 112 Fed. 658 (D. C. Iowa).

2. Keeping books in such a manner as to conceal true financial condition, etc. In *re Feldstein*, 6 A. B. R. 458, 108 Fed. 794 (D. C. N. Y.).

3. Frivolous explanation of failure to keep books. In *re Berkowitz*, 4 A. B. R. 37 (Special Master, N. Y.).

Instances of Lack of Contemplation of Bankruptcy.

1. Failure to keep books of account while formerly in business six years before the passage of the Bankruptcy Act. In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

2. Failure to keep books for a year and half before the passage of the Bankruptcy Act. In *re Cohn*, 1 A. B. R. 655 (Ref. Mo.).

3. In *re Lafleche*, 6 A. B. R. 483, 109 Fed. 307 (D. C. Vt.); In *re Stark*, 2 A. B. R. 785, 96 Fed. 88 (D. C. N. Y.); In *re Mackenzie*, 12 A. B. R. 605, 132 Fed. 114 (D. C. Conn.); In *re Hamilton*, 13 A. B. R. 333, 133 Fed. 823 (D. C. N. Y.); In *re Corn*, 5 A. B. R. 478, 106 Fed. 143 (D. C. Ga.); In *re Boasberg*, 1 A. B. R. 353 (Special Master N. Y.); In *re Lowenstein*, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y.); In *re Idzall*, 2 A. B. R. 741, 696 Fed. 314 (D. C. Iowa); impliedly, In *re Keefer*, 14 A. B. R. 290, 135 Fed. 885 (D. C. N. Y.); compare, on germane subjects of concealment of assets and false oath, *Smith v. Keegan*, 7 A. B. R. 4, 111 Fed. 157 (C. C. A. Mass.); impliedly, In *re Murray*, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.); In *re Griffin*, 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.);

if the failure to keep them was with the intent to conceal the bankrupt's financial condition."

In *re* Rauchenplat, 9 A. B. R. 766, 1 P. R. 471 (D. C. Porto Rico): "It is not required that a bankrupt's books shall be kept in the most scientific manner, but only in such a way that the condition of his affairs may be substantially ascertained; and even if badly kept, it is not ground for refusing discharge, unless there was a fraudulent purpose in so doing on the part of the bankrupt."

In *re* Allendorf, 12 A. B. R. 320, 129 Fed. 981 (D. C. Iowa): "This bankrupt did not fail entirely to keep books. He kept a cash book, showing the amount received from the daily sales of the goods and other sources, and most of the payments for goods, expenses and other matters; also a bank book and the original invoices or bills of goods purchased. He kept no day book, blotter or ledger." In this case the destruction of salesmen's slips on transfer to the cash book of the items, was held not a destruction with intent to conceal financial condition.

In *re* Brice, 4 A. B. R. 355, 102 Fed. 114 (D. C. Iowa): "The evidence shows that the books kept did not contain a list or statement of the debts due from the bankrupt and it is therefore true that from the books the true financial condition of the bankrupt could not be ascertained, but it is not shown that this was done with any fraudulent intent to conceal his financial condition * * *; and the same is true with respect to the charge that two pages of the ledger have been torn out, thus leaving this book in a mutilated condition."

In *re* Burstein, 20 A. B. R. 399, 160 Fed. 765 (D. C. Conn.): "He kept no books; but it is impossible from the facts set forth, to draw the inference that his failure to keep them was 'with the intent to conceal his true financial condition.'"

In *re* Brockman, 21 A. B. R. 251, 168 Fed. 1015 (D. C. Ky.): "The argument of counsel was largely addressed to the failure of the bankrupt to keep books in a proper way, and it seemed to be supposed that the act requires every person who is authorized to petition for a discharge in bankruptcy to keep books and to keep them well. The act does not require anybody to keep books nor fix any standard of bookkeeping. All it does in the premises is to provide that a discharge shall not be granted a bankrupt who has destroyed, concealed or failed to keep books with intent thereby to conceal his financial condition. The intent must be shown to the satisfaction of the court to bring the case within the statute, and it would be a harsh and unjust construction to say that the intent must, as matter of law, be presumed from mere bad bookkeeping or from a mere failure to keep books. If that were the law probably nine out of every ten country people and a very large proportion of plain people everywhere would be refused discharges if applied for, inasmuch as few of them can keep books which are intelligible to anybody except themselves. It is a matter of common knowledge that a large proportion of the people do not keep books at all—for example, farm-

In *re* Napier, 23 A. B. R. 560 (Spec. Master Ky., affirmed by D. C.); In *re* Currie, 23 A. B. R. 539 (Ref. Mich.); instance, In *re* Marcus, 30 A. B. R. 176, 203 Fed. 29 (C. C. A. N. Y.); In *re* Brown, 29 A. B. R. 73, 199 Fed. 356 (D. C. N. Y.); In *re* Sabeevitz, 28 A. B. R. 623, 197 Fed. 109 (D. C. N. Y.); In *re* Tanner, 27 A. B. R. 615, 192 Fed. 572 (D. C. Wash.); In *re* Marcus & Scherr, 27 A. B. R. 164, 192 Fed.

743 (D. C. N. Y.); In *re* Bradin, 24 A. B. R. 793, 179 Fed. 768 (D. C. Pa.); In *re* Hodge, 30 A. B. R. 522, 205 Fed. 824 (D. C. N. Y.).

Under the Act of 1867, fraudulent intent was not necessary, to the bar; the obligation to keep proper books was absolute, hence the decisions under that law are inapplicable. In *re* Schultz, Jr., 6 A. B. R. 91, 109 Fed. 269 (D. C. N. Y.).

ers, clerks, mechanics, and wage earners generally, but this is either because they see no need for it or else cannot do it satisfactorily. The ways of the people in the country are very different from those of great business concerns in cities and towns of the larger size. At all events, bad intent must be made to appear to the satisfaction of the court, and the testimony in this case does not, in my judgment, meet this requirement. * * * I have frequently had similar questions under consideration, and, among others, in the case of J. D. Stark, Bankrupt, in 1905. In an opinion then delivered this language was used: 'It certainly is true that the bankrupt's idea of bookkeeping was about as crude as could possibly be imagined, and one which, while consistent with his habits and notions of business, was about as far as possible from what are correct or tolerable business methods. * * * While common sense and good judgment require a merchant to keep books, yet if he does not do so and fails in business, he is not denied a discharge for merely being a poor or even the poorest possible bookkeeper. Nor could such a provision of law be wise, for the greatest rascals may sometimes have the most perfectly kept books, so far at least as their face appearance may indicate. Under the Bankruptcy Act, therefore, the intent with which bad bookkeeping is done is the material thing. If that intent exist it is immaterial whether, superficially considered, the books are ill-kept or well-kept.'

It has been held, however, that the concealment intended need not be concealment with intent to defraud creditors.

In *re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.): "It makes no difference that he did so for the purpose of preventing his confidential manager from knowing his financial condition and not for the purpose of defrauding his creditors. It remains true that he intentionally kept his books so as to conceal his financial condition, and he is therefore by the express terms of the act, not entitled to a discharge."

And, since the amendment of 1903, it is unnecessary to show that the concealment was in contemplation of bankruptcy.

In *re Newburg & Durham*, 31 A. B. R. 365, 209 Fed. 195 (C. C. A. N. Y.): "The Act as originally passed contained the word 'fraudulent' before the word 'intent,' the word 'true' before the word 'financial,' and the words 'and in contemplation of bankruptcy' before the word 'destroyed.' So that under the Act as it now reads it is no longer necessary to prove that the bankrupt's intent was fraudulent or that his acts were done in contemplation of bankruptcy. It is enough to prevent his discharge if he has, with intent to conceal his financial condition, failed to keep books of account from which such condition might be ascertained. If, then, the books fail to show his financial condition and were kept with the intent that they should fail to show it, the bankrupt cannot be discharged."

It has been held that where the destruction was conceded, but was claimed to have been done rather for the purpose of destroying evidence of criminal transactions than of defrauding creditors, it was none the less for the purpose of concealing his true financial condition.

In *re Wolf*, 19 A. B. R. 70, 156 Fed. 543 (D. C. N. Y.): "Perhaps the first impression which the language 'with intent to conceal his financial condition' gives is an intent to conceal such condition from his creditors, but the act does not say so. In this case, the bankrupt admits that he destroyed his

books with intent to conceal the records of his business, which, if exhibited, would show that he had been doing business in violation of a criminal statute; and I think that he therefore destroyed his books with intent to conceal his financial condition. It would be a dangerous precedent to establish in the bankrupt law that a man who wilfully destroyed his books with the intent thereby to conceal evidence of a crime, and defeat a criminal prosecution, could thereby defeat objections to his discharge. Such an act is a wilful destruction of the evidence which the Bankrupt Act contemplates should be preserved for the benefit of creditors. It is an act which, in fact, conceals his financial condition from his creditors. I think that such an act, if actually done with the intent of concealing a crime, and not of injuring the creditors, comes within the language of the act. If such a defense should be held good, it might be falsely set up. In my opinion, upon the whole, the specification of objection to the discharge was proved, and the discharge should be refused."

§ 2546. Intent Inferable from Circumstances.—The intent may be inferred from surrounding circumstances.⁴

McKibbon et al. v. Haskell, 28 A. B. R. 588, 198 Fed. 639 (C. C. A. Ia.): "The bankrupt failed to keep such books of account, or records, or any books of account, after he moved to Des Moines. Prior to that time he had kept books of account, a ledger and an account book. With what intent did he fail to keep books of account at Des Moines? That failure concealed his extraordinary purchase of new merchandise on credit, concealed his sales of this merchandise in bulk at less than cost and the use of its proceeds to pay his relatives and friends, concealed his financial condition even from himself, for he testified that he did not and does not know what his condition actually was.

"The Act of Congress proclaims the presumption and expectation of the law that honest merchants will keep account books which will disclose their true financial condition. In the absence of prevailing evidence to the contrary every man is presumed to intend the natural and inevitable consequence of his acts and the evidence which has been recited so strongly supports this legal presumption that it has overcome the persuasive presumption of the finding of the court below to the contrary and was convinced that the bankrupt in this case failed to keep account books at Des Moines with intent to conceal his financial condition."

Thus, where the bankrupt is a man of business experience and absolutely fails in every respect to keep books of account or records from which his financial condition might be ascertained, the presumption arises that by such conduct he intended to conceal such condition.

In re Newbury & Durham, 31 A. B. R. 365, 209 Fed. 195 (C. C. A. N. Y.): "When a trader doing a large business fails to keep books or records from which his financial condition can be ascertained, the law, in the absence of any reasonable explanation, will presume an intent to conceal. No other inference can justly be drawn."

4. *In re Feldstein*, 6 A. B. R. 458, 108 Fed. 794 (D. C. N. Y., affirming 8 A. B. R. 160, 115 Fed. 259, C. C. A.); instance, *In re Hirschowitz*, 27 A. B. R. 701, 194 Fed. 562 (D. C. Pa.); instance, *In re Weston*, 30 A. B. R. 647, 206 Fed. 281 (C. C. A. N. Y.); *In re Hodge*, 30 A. B. R. 322, 205 Fed. 824 (D. C. N. Y.); *In re Wiedmann*, 26 A. B. R. 697, 189 Fed. 684 (D. C. N. Y.); *In re Graves*, 26 A. B. R. 633, 189 Fed. 847 (D. C. Pa.).

Or where the bankrupt is a man of business experience but omits debts due to relatives.

In *re Koelle*, 22 A. B. R. 515, 171 Fed. 257 (D. C. Pa.): "It is conceded that there are no entries concerning these loans of money from relatives and friends, and it is therefore beyond dispute that the bankrupt's financial condition could not have been ascertained by an inspection of his books. The sole remaining question is, what was his intent in failing to make the proper entries? The referee has found that the intent was to conceal his financial condition, and after a review of the testimony I agree with this finding. The bankrupt's business experience had been prolonged and reasonably extensive; he is a man of intelligence, as his testimony sufficiently indicates; and it is not credible that he could have failed to know that his books omitted material items of his indebtedness, and were therefore defective."

But where the bankrupt is a mere employee no such presumption would arise.⁵

Stupidity and ignorance of the bankrupt tend to negative fraudulent intent; yet, though he be ignorant, he may be of sufficient intelligence, or his conduct on the stand may be such, as to neutralize the excuse.⁶

Acts of similar nature are admissible in proof of the bankrupt's intent.⁷

The bankrupt must have presumed to have intended the natural and probable consequences of his act.⁸

§ 2547. Property Exempt, or Not Recoverable, etc.—Not Necessarily Negatives Intent to Conceal.—Intent to conceal is not negated, necessarily, by the fact that the property omitted from the books of account could not have been recovered by the creditors or would have been exempt, anyway; but such fact is entitled to weight in determining whether the omission was with fraudulent intent.⁹

§ 2548. Keeping Books in Same Defective Manner for Long Period Tends to Negative Intent.—The keeping of books in the same defective manner for years tends to negative fraudulent intent; but, of course, is not conclusive rebuttal.

Thus, the keeping of books in the same manner for years before the passage of the act, although that manner be inadequate to show the debtor's financial condition, tends to negative intent to conceal it by such means.¹⁰

5. Impliedly, In *re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

6. In *re Goldich*, 21 A. B. R. 249, 164 Fed. 82 (D. C. Pa.).

7. In *re Currie*, 23 A. B. R. 539 (Ref. Mich.).

8. In *re Currie*, 23 A. B. R. 539 (Ref. Mich.).

9. Compare, on germane subjects of concealment of assets and false oath, ante, §§ 2493, 2534.

In *re Royal*, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.); In *re Todd*, 7 A.

B. R. 770, 112 Fed. 315 (D. C. N. Car.); In *re Conroy*, 14 A. B. R. 249, 134 Fed. 164 (D. C. Pa.).

Imputing acts of one partner in concealment of books, etc., to the other, and of agent to principal: see ante, §§ 2484, 2486.

10. In *re Pinsker*, 25 A. B. R. 494 (Sp. M. N. Y.); In *re Idzall*, 2 A. B. R. 741, 96 Fed. 314 (D. C. Iowa).

Continuing concealment of books may be perpetrated by failure after bankruptcy to reveal their known whereabouts although original con-

But compare, *In re Feldstein*, 8 A. B. R. 160, 115 Fed. 259 (C. C. A. N. Y.), affirming 6 A. B. R. 458, 108 Fed. 794): "We find no force in the suggestion that the loans were made before the Bankruptcy Act was passed, and the failure to enter them in the books or records of the business began then. The referee held that 'while he was solvent, and could promptly meet all his obligations, and before the passage of the Bankruptcy Act, he was at liberty to keep his books in any manner he pleased, or to keep no books at all, but when he asks the benefits of the Bankruptcy Act he is bound to show a compliance with its provisions regarding his books as well as any other requirement; but if he kept improper or incorrect books before the passage of the Bankruptcy Act, and to such an extent as to make them improper or insufficient under the act, he should, upon the passage of the act, have altered his system of book-keeping so as to comply with its requirements, if he ever expected to seek the benefit of its provisions.' In this opinion we concur."

§ 2549. No Special Manner of Keeping Books Requisite.—No special manner of keeping books is requisite to avoid the censure of the statute, so long as an ordinary person, having a general knowledge of accounts, can discover the true financial condition.¹¹

cealment was perpetrated before the passage of the Bankrupt Act, *In re Kamsler*, 2 N. B. N. & R. 97 (Ref. N. Y.).

11. *In re Simon*, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.); *In re Feldstein*, 6 A. B. R. 458, 108 Fed. 794 (D. C. N. Y., affirmed in 8 A. B. R. 160, 115 Fed. 259). But compare, *In re Leopold*, 5 A. B. R. 283 (Ref. N. Y.).

Under the Act of 1867 the obligation to keep proper books was absolute, *In re Schultz, Jr.*, 6 A. B. R. 91, 109 Fed. 264 (D. C. N. Y.).

Instances Held to Be Such Failure as to Bar Discharge.

1. Books showing no indebtedness to relatives: disbursements to them, however, on the eve of insolvency, on alleged debts: previous statements to obtain credit showing no debts to relatives: bankrupt's testimony that he informed creditors that statement did not contain debts to relatives, discredited as inherently improbable; held, failure to keep books proved and discharge barred, *In re Greenberg*, 8 A. B. R. 94, 114 Fed. 773 (D. C. Conn.).

2. Books showing no indebtedness to relatives, but large payments made to them on alleged debts, on the eve of insolvency, *In re Kamsler*, 2 N. B. N. & R. 97 (Ref. N. Y.).

3. Debts to family for money loaned to the bankrupt, scheduled but never entered on the books of account of the bankrupt although bankrupt kept book-keeper and complete set of books; and only memoranda of the debts were in two small memorandum books, kept in the bankrupt's own custody, con-

cealed from everybody; held, not the keeping of "books of account or records which the Bankrupt Act calls for." *In re Feldstein*, 8 A. B. R. 160, 115 Fed. 259 (C. C. A. N. Y., affirming *In re Feldstein*, 6 A. B. R. 458, 108 Fed. 794).

4. Bankrupt, on removing to another city leaving his account books behind although taking everything else; and thereafter keeping simply memoranda on slips of paper which he destroys each month, being finally closed out through the instrumentality of a friend's levying execution, *In re Baumberger*, 2 N. B. N. & R. 95 (Ref. N. Y.).

5. *In re Leopold*, 5 A. B. R. 279 (Ref. N. Y.).

6. Frivolous excuse for failure to keep, *In re Berkowitz*, 4 A. B. R. 37 (Special Master, N. Y.).

7. Where a bankrupt secretly disposed of a stock of goods and concealed his books in a place where no one would be expected to inquire for them, which books, however, showed nothing of the transaction in question, but there was evidence of other false and misleading entries, it will be held that the bankrupt has "with fraudulent intent concealed his true financial condition in contemplation of bankruptcy" failed to keep proper books of account, *In re Morgan*, 4 A. B. R. 402, 101 Fed. 982 (D. C. Ark.).

8. Keeping bank account in wife's name, keeping no books of account nor record of receipts and disbursements, commingling his own funds with those of his wife in his wife's

In re Rauchenplat, 9 A. B. R. 766, 1 P. R. 471 (D. C. Porto Rico): "It is not required that a bankrupt's books shall be kept in the most scientific manner, but only in such a way that the condition of his affairs may be substantially

name up to the very eve of bankruptcy, with the purpose, as the bankrupt testifies, to keep anybody from "jumping on it;" i. e., his money, before he had an opportunity to use it, In re Bragassa, 4 A. B. R. 519, 103 Fed. 936 (D. C. Tex., affirmed in 5 A. B. R. 700).

9. Merchant ignorant but still with sufficient intelligence to know better, keeping defective books but feigning forgetfulness, In re Goldich, 21 A. B. R. 249, 164 Fed. 82 (D. C. Pa.). In re Berger 29 A. B. R. 712, 200 Fed. 325 (D. C. N. Y.).

10. Partnership books, from which a statement was made by the bookkeeper and furnished to a mercantile agency as a basis for credit, and which contain no entries of loans, particularly of loan from relatives of the partners, etc., *Pomerantz v. Hopkins*, 21 A. B. R. 857, 168 Fed. 444 (D. C. Pa.).

11. Partnership, purchasing a lot of goods not of kind dealt in, no entry thereof being made on the books, nor any reasonable excuse being offered for not making such entry, intent to conceal financial condition presumed, In re Schachter, 22 A. B. R. 389, 179 Fed. 683 (D. C. N. Y.).

12. Debts to relatives omitted because bankrupt thought they would not be pressed. In re Koelle, 22 A. B. R. 515, 171 Fed. 257 (D. C. Pa.).

Instances Held Not to Be Such "Failure to Keep" as Would Bar Discharge.

1. Omission of debt from ledger where done to prevent other creditors from ascertaining that the debtor had received financial assistance but without any contemplation of bankruptcy and rather with expectation of pulling through all right, not sufficient to bar discharge before amendment of 1903. *Van Ingen v. Schophofen*, 12 A. B. R. 24, 129 Fed. 352 (C. C. A. Mo.), in which case, however, there was no showing as to whether the bankrupt was at the time hopelessly insolvent. Yet, the bankrupt kept the loans to him off his ledger for fear the other creditor would "close him up." This would seem to indicate fraudulent intent and contemplation of financial ruin, at any rate. It would hardly seem that actual "bankruptcy" must be proved to have been contemplated.

2. Keeping no day book, blotter or

ledger, but keeping cash book showing daily receipts for sales and other sources and most of the payments for goods, expenses and other matters, also keeping a bank book and original invoices, In re Allendorf, 12 A. B. R. 320, 129 Fed. 98 (D. C. Iowa).

3. Insolvent condition not known to bankrupts until shortly before bankruptcy but system of bookkeeping defective, In re Mackenzie, 12 A. B. R. 605, 132 Fed. 114 (D. C. Conn.).

4. Sale of lumber entered on partnership books at larger price than actually received, intending thereby to conceal preference: nevertheless facts not deemed sufficient, In re Hamilton, 13 A. B. R. 333, 133 Fed. 823 (D. C. N. Y.).

5. Nature of business not requiring keeping of ordinary books, In re Corn, 5 A. B. R. 478, 106 Fed. 143 (D. C. Ga.).

6. Out of business for nearly three years before passage of Bankruptcy Act, In re Prager, 13 A. B. R. 527, 134 Fed. 1006 (D. C. W. Va., distinguishing In re Ablowich, 3 A. B. R. 586, 99 Fed. 81).

7. Out of business for six years before Bankruptcy Act, failure to keep books while in business, In re Holman, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

8. Failure to keep books in small business, reason therefor being to avoid the necessary work involved in keeping books rather than to conceal true condition, In re Lowenstein, 2 A. B. R. 193, 106 Fed. 51 (Ref. N. Y.).

9. Failure to show property bought with proceeds of surrender of life insurance policy made payable to wife, such proceeds belonging to wife, In re Dews, 2 A. B. R. 483, 96 Fed. 181 (D. C. N. Y.).

10. Failure to keep books where for at least three years prior to adjudication he was not engaged in any business to which the keeping of books was necessary or proper, *Sellers v. Bell*, 2 A. B. R. 529, 94 Fed. 801 (C. C. A. Ala., distinguishing 4 A. B. R. 109).

11. Failure to keep books in an adequate manner to exhibit true financial condition but keeping them in the same manner as before the passage of the Bankruptcy Act, negatives fraudulent intent to conceal true financial condition thereby, there being no other

ascertained; and even if badly kept, it is not ground for refusing a discharge, unless there was a fraudulent purpose in so doing on the part of the bankrupt."

§ 2549½. Omitting Debts to Relatives.—It is no excuse for the omission from account books of debts to relatives that the bankrupt thought they would never be pressed. They either were or were not debts and it is precisely those debts which are sure to be presented in case of the debtor's insolvency that are of the most moment to the creditor.¹²

In *re Koelle*, 22 A. B. R. 515, 171 Fed. 257 (D. C. Pa.): "His only explanation is that 'I never counted those notes; I thought that because I knew they would not push me, you know, and I thought it was not necessary for these people to know I had money from my wife.' Prima facie at least, a man must be held to intend the natural and probable consequence of his acts, and the inevitable consequence of this omission was to conceal his financial condition. The presumption of such an intent may not be conclusive, but it has not been met by the testimony that was offered before the referee."

§ 2550. Concealment or Destruction of Books, etc., Which Might Have Aided in Ascertainment of Financial Condition.—Thus, also

proof of fraudulent intent, In *re Idzall*, 2 A. B. R. 741, 96 Fed. 314 (D. C. Iowa).

12. Disappearance of books of account seven years before the passage of the Bankruptcy Act itself fails to show fraudulent intent to conceal true financial condition thereby, In *re Stark*, 2 A. B. R. 785, 96 Fed. 88 (D. C. N. Y.).

13. No account of bills nor debts payable and two pages of ledger torn out; not being shown to have been gone by bankrupt, etc., In *re Brice*, 4 A. B. R. 355, 102 Fed. 114 (D. C. Iowa).

14. School teacher and also agent for farm owned by his wife and two other heirs failing as such agent to keep account of rents collected and taxes and expenses paid; and withdrawing of funds from bank and redepositing of same in wife's name: yet not sufficient to bar discharge, In *re Keefer*, 14 A. B. R. 290, 135 Fed. 885 (D. C. N. Y.).

15. Evidently no purpose to keep a false set of books or to conceal condition, and the informal manner of keeping them explained and not suspicious, discharge not refused, In *re Rauchenplat*, 9 A. B. R. 763, 1 P. R. 471 (D. C. Porto Rico).

16. Books scheduled, but left at place of business, bankrupt's testimony not being discredited, In *re Eades*, 16 A. B. R. 30, 143 Fed. 293 (C. C. A. Ills.).

17. Books claimed to be insufficient, kept in another state under control of a partner located there, In *re Garrison*,

17 A. B. R. 831, 149 Fed. 178 (C. C. A. N. Y.).

18. Where the superintendent of a mine is adjudicated a bankrupt, his failure to keep the books of account, not required by his personal business, indicates no fraudulent intent for which he may be denied his discharge, In *re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

19. Throwing blame of insufficient bookkeeping on bookkeeper, In *re Currie*, 23 A. B. R. 539 (Ref. Mich.).

19½. Where stockbroker kept customer's account under numbers instead of under the names, but having separate paper to identify customer with the number. In *re A. O. Brown & Co.*, 30 A. B. R. 305, 204 Fed. 63 (C. C. A. N. Y.).

20. Failure to keep inventory where financial condition could be ascertained from other books. In *re Simon*, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.).

21. Failure to take inventory each year, where method of bookkeeping showed, with reasonable accuracy, true financial condition. In *re Marcus*, 30 A. B. R. 176, 203 Fed. 29 (C. C. A. N. Y.).

12. In *re Pomerantz & Hopkins*, 21 A. B. R. 857, 168 Fed. 444 (D. C. Pa.); compare, In *re Greenberg*, 8 A. B. R. 94, 114 Fed. 773 (D. C. Conn.); compare, In *re Kamsler*, 2 N. B. N. & R. 97 (Ref. N. Y.); compare, In *re Feldstein*, 8 A. B. R. 160, 115 Fed. 259 (C. C. A. N. Y.).

if the bankrupt, fraudulently and knowingly, has concealed¹³ or destroyed¹⁴ books of account or records which might have aided in the ascertainment of his financial condition, his discharge will be refused.¹⁵

Obviously, the clause "from which his financial condition might be ascertained," § 17 (b), does not require that creditors show the books concealed or destroyed to have been sufficient, either in themselves or with other books, to ascertain in full the financial condition of the bankrupt. It is enough, if, from them, naturally might have been ascertained pertinent facts about the bankrupt's financial condition. To put more upon the creditors would nullify the provision. Indeed, the statute might more properly be

13. Instances held to be "concealment" of books of account sufficient to bar discharge.

1. Substitution of copy from which certain original entries were omitted in order to save inquiry and explanation, all the transactions being between relatives and open to suspicion, *In re Bachron*, 8 A. B. R. 732 (D. C. Wis.).

2. Before bankruptcy, failing debtor sending his account books to one creditor with statement that, if examined in supplementary proceedings, he would swear he did not know their whereabouts; thereafter several times consulting them while in the creditor's hands, subsequently swearing while in bankruptcy that he does not know their whereabouts, *quære*, *In re Kamslers*, 2 N. B. N. & R. 97 (Ref. N. Y.).

3. Bankrupt testifying that his books were in his safe, but proof showing safe not touched by anybody but himself, *In re Lewin*, 18 A. B. R. 72 (D. C. N. Y.).

Instances held not to be such concealment of books as to bar discharge.

1. Concealment of books begun in 1893 could not be in "contemplation of bankruptcy," as required before the Amendment of 1903, *In re Polakoff*, 1 A. B. R. 359 (Master's Report, affirmed by D. C. N. Y.).

2. Three years before bankruptcy and not certain even then, *In re Phillips*, 3 A. B. R. 542, 98 Fed. 844 (D. C. N. Y.).

3. Putting account books in barrel in cellar, on selling out business. *In re Murray*, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.).

In re Wiedmann, 26 A. B. R. 697, 188 Fed. 684 (D. C. N. Y.).

14. Instances of destruction of books sufficient to bar discharge.

1. Destruction of books of partnership of which bankrupt a member, being material to a proper understanding of his own condition, *In re Conley*, 9 A. B. R. 496, 120 Fed. 42 (D. C. Ga.).

2. Destruction of paid checks and stubs showing purposes for which and to whom checks were paid, where no other books were kept. *In re Hodge*, 30 A. B. R. 522, 205 Fed. 824 (D. C. N. Y.).

Instances of destruction of books held insufficient to bar discharge.

1. Destruction of check book and pass book at a time when bankrupt's debts were few and of trifling amount is not a bar to discharge as being with intent to conceal true financial condition even though the evidence shows a living beyond one's means and also indulgence in stock gambling and borrowing within a short time of bankruptcy. *In re Studebaker*, 11 A. B. R. 384, 127 Fed. 591 (C. C. A. N. Y., reversing 10 A. B. R. 205).

2. Altering and mutilating old records of a corporation of which bankrupt was merely bookkeeper, where mutilated parts were immaterial anyway, *Bauman v. Feist*, 5 A. B. R. 703, 107 Fed. 83 (C. C. A. Iowa).

3. Destruction of salesman's slips, the amounts at close of each day being transferred to cash book, held insufficient where no proof exists that destruction was with fraudulent intent. *In re Allendorf*, 12 A. B. R. 320, 129 Fed. 981 (D. C. Iowa).

4. Putting account books in barrel in cellar on selling out business, *In re Murray*, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.).

5. Evidence showing that bankrupt was seen leaving his place of business clandestinely and late at night carrying away with him what seemed to be books, held insufficient to show destruction or concealment of inventory books in face of testimony of bookkeeper that such books were not kept. *In re Simon*, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.).

15. *Baylor v. Rawlings*, 28 A. B. R. 773, 200 Fed. 131 (C. C. A. Neb.).

read as if the words "books of account or records" were inserted separately after the words "destroyed" and "concealed," thus: "Has destroyed or concealed books of account or records or failed to keep books of account or records from which his financial condition might be ascertained."

But compare, *In re Eades*, 16 A. B. R. 30, 143 Fed. 293 (C. C. A. Ills.): "* * * that they were not material for ascertaining his financial condition or for other purpose."

SUBDIVISION "D."

PRESENTATION OF FALSE CLAIM OR DEMAND AS BAR TO DISCHARGE.

§ 2551. Presentation of False Claim or Demand as Bar to Discharge.—If the bankrupt shall have presented under oath any false claim for proof against the estate, or used any such claim in composition, personally or by agent, proxy or attorney, or as agent, proxy or attorney, his discharge may be barred.

This was an offense, visited with severe penalties, under the first English Bankrupt Act, that of 34 Henry VIII.¹⁶ It is also one of the offenses punishable by imprisonment under the provisions of § 29, of the United States Bankruptcy Act of 1898. It may be committed by the bankrupt, undoubtedly, as well as by a third person; as, for instance, where the bankrupt, "as agent," presents a false claim in behalf of a wife, as sometimes happens. It is also possible for the bankrupt to aid a creditor in presenting a false claim by making a false oath to the amount of the debt in his schedules.¹⁷

There appear to be no decided cases directly upon the point of refusal of a discharge upon this ground. It would seem to be easy for a bankrupt to commit this offense in composition cases and thus to bar his composition.

SUBDIVISION "E."

FRAUDULENT TRANSFERS, CONCEALMENTS OR REMOVALS WITHIN FOUR MONTHS OF BANKRUPTCY AS BAR TO DISCHARGE.

§ 2552. Grounds of Opposition to Discharge Added by Amendment of 1903.—By the amendment of 1903 certain additional grounds of discharge were added; fraudulent transfers; concealments and removals within the four months preceding the bankruptcy; the obtaining of property on false representations, the procurement of a previous discharge within six years and the failure to obey an order of the court.¹⁸

16. See ante, Introduction, § (g), Act of King Henry VIII.

17. Compare, for suggestion along this line, *In re Miner*, 9 A. B. R. 102, 117 Fed. 953 (D. C. Ore.).

18. **Amendment to Bankruptcy Act**

may apply to acts committed before the Amendment even though the law as a whole may not apply to acts committed before 1898, *In re Neely*, 12 A. B. R. 407, 134 Fed. 667 (Ref. N. Y.): "In all such cases, the courts have very

§ 2553. Transfer, Removal or Concealment within Four Months, as Bar to Discharge.—A bankrupt's discharge will be barred if, at any time subsequent to the first day of the four months immediately preceding the filing of the bankruptcy petition, he shall have transferred, removed, destroyed, concealed, or permitted to be removed, destroyed or concealed, any of his property, with intent to hinder, delay or defraud any of his creditors.¹⁹

§ 2553½. Preferences Not Amounting to Transactions with Intent to Hinder, Delay or Defraud, No Bar.—A preference is not a bar unless it also amounts to a transfer, removal or concealment within four months preceding the filing of the petition in bankruptcy with intent to defraud creditors or to fraudulently hinder or delay them.²⁰

§ 2554. Must Be within Four Months Preceding Bankruptcy.—To be, in and of themselves, bars to discharge, fraudulent transfers, concealments or removals of property must have been made within the four months preceding bankruptcy. "*Expressio unius, exclusio alterius.*"²¹

In so far as fraudulently transferred or concealed or removed property may be the subject of fraudulent and knowing "concealment" of property belonging to the estate, mentioned as the first ground for barring discharge, it is obvious that the original fraudulent transfer or removal or initial con-

properly held that no retroactive effect can be given to the discharge features of the law.

"But the reasoning does not apply with the same force to an amendment creating a new ground of objection to a discharge for a bankruptcy law is already in existence, and the amendments are engrafted upon an existing statute. Restrictions upon discharge affect the remedy only. The right to a discharge is not an absolute vested right. It was not originally a feature of bankruptcy legislation either in this country or in England. The fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property equally among his creditors. Originally this was its only purpose, and it was confined to traders as a purely commercial regulation. Latterly a second element was added in the provisions for discharge upon such terms and conditions as the act may provide."

In re Carleton, 12 A. B. R. 475 (D. C. Mass.).

19. Bankr. Act, § 14 (b). In re Miller, 14 A. B. R. 329, 135 Fed. 591 (D. C. Va.); In re Gift, 12 A. B. R. 244, 130 Fed. 230 (D. C. Pa.); instance, In re Young, 15 A. B. R. 477, 140 Fed.

728 (D. C. N. Car.); In re Hirskowitz, 27 A. B. R. 701, 194 Fed. 562 (D. C. Pa.). Instance, transferring property to avoid payment of judgment, *Pirvitz v. Pithan*, 27 A. B. R. 621, 194 Fed. 403 (C. C. A. Iowa). Compare, In re Bouck, 28 A. B. R. 378, 199 Fed. 453 (D. C. N. Y.).

20. In re Mintzer, 28 A. B. R. 743, 197 Fed. 647 (D. C. N. Y.); In re Bouck, 28 A. B. R. 378, 199 Fed. 453 (D. C. N. Y.); In re Friederich, 28 A. B. R. 656, 199 Fed. 193 (D. C. Minn.). In re George Julius and Simon Julius, — A. B. R. —, — Fed. — (C. C. A. N. Y., reversing In re Julius Bros., 31 A. B. R. 132, 209 Fed. 371), reported in N. Y. Law Journal, Sept. 15, 1914; In re Brouck, 28 A. B. R. 378, 199 Fed. 453 (D. C. N. Y.); compare VanDerstein v. National Biscuit Co., 23 A. B. R. 347, 174 Fed. 521 (C. C. A. N. Y.). Compare ante, § 2496.

21. See ante, §§ 2482, 2498, 2506, et seq. *Obiter*, In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Penn.); *Stephenson v. Brid*, 25 A. B. R. 903 (Sup. Ct. Ala.); In re Schickerling, 30 A. B. R. 313, 204 Fed. 592 (C. C. A. N. Y.); In re Hennebry, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa); In re Wakefield, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.).

cealment may have occurred more than four months before the bankruptcy, so long as the property is still recoverable by the trustee and the concealment of it continues after the bankruptcy, the fraudulent transfer itself not being the ground of opposition but constituting the property involved, property "belonging to the estate," the *concealment* of which constitutes the real bar to the discharge. In such cases, however, the property must be shown to be still recoverable, else concealment of it is not concealment "from the trustee" of "property belonging to the estate."

§ 2554½. Effect of Failure to Record until within Four Months.

—Where the transaction between the parties took place more than four months before, but the instrument of transfer was not recorded until within the four months, the question arises whether this particular bar to discharge—transfer, removal or concealment within four months—exists.²²

§ 2555. But Property Need Not Be Still Recoverable.—It does not appear necessary, under this ground of opposition to discharge, to prove that the property was still recoverable at the time the trustee was elected. It is the perpetration of the fraudulent transfer or removal, etc., that is the bar; not the concealment of it from the trustee, and if perpetrated within the four months it is sufficient, even though the trustee may be unable, for some reason, to recover it now.

§ 2555½. "Continuing Concealments."—Concealment being essentially a continuing act, it is not necessary, as we have seen above, where concealment within four months is urged as the bar to discharge, that the initial act of concealment shall have taken place within the four months; it is sufficient if the concealment began before the four months period and continued until within that period.

In *re James*, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C.): "It is clear that on October 25, 1907, the petitioner, being insolvent, and in view of committing an act of bankruptcy, fraudulently withdrew from the reach of his creditors a portion of his property, in a manner clearly within the prohibitive language of the law. It is equally clear that he continued to conceal, and thereby continuously withdrew from his creditors, the property until January 5, 1908, and then only disclosed its concealment because it was discovered by another person. He therefore 'concealed' the property at all times up to the day of its discovery. It was by his act kept—continued—'concealed,' thus coming within the language of the act in point of time, four months next preceding the date of the filing of the petition. It may be 'hard lines' on the petitioner to strip him of his property and leave him bound for the amount remaining due to his creditors; but by his own conduct he has subjected himself to the penalty." This case quoted further at § 2498.

James v. Stone, 24 A. B. R. 288, 181 Fed. 1021 (C. C. A. N. Car., affirming *In re James*, 23 A. B. R. 703, 175 Fed. 894): "While in the first instance the act of concealment was more than four months next preceding the filing of the petition, nevertheless it is undisputed that the concealment was continued un-

22. Compare, *In re McKane*, 19 A. B. R. 103, 152 Fed. 733 (D. C. N. Y.),

til within the four months' period, with the consent and acquiescence of the petitioner, and for a fraudulent purpose, thus bringing this case clearly within the purview of the statute. To hold otherwise would be to open wide the door for the commission of fraud by those who may be actuated by a desire to evade the payment of their honest debts."

SUBDIVISION "F."

FALSE STATEMENTS IN WRITING TO OBTAIN MONEY OR PROPERTY ON CREDIT.

§ 2556. Obtaining Money or Property on Credit on False Statement, in Writing, as Bar to Discharge.—A bankrupt's discharge will be barred if he shall have obtained money or property on credit upon a materially false statement in writing, made by him to any person or his agent for the purpose of obtaining credit from such person.²³

It is immaterial whether the credit obtained is large or small, or whether it is extended to an old customer, or to a new one.²⁴

23. Bankr. Act, § 14 (b) (e); In re Dresser, 16 A. B. R. 561, 146 Fed. 383 (C. C. A. N. Y.); In re Hardie & Co., 16 A. B. R. 313, 143 Fed. 607 (D. C. Tex.); In re Harr, 16 A. B. R. 216, 143 Fed. 421 (D. C. Mo.); In re Dresser, 13 A. B. R. 639, 144 Fed. 318 (D. C. N. Y.); In re Peterson, 10 A. B. R. 355 (D. C. Minn.); In re Goodhile, 12 A. B. R. 380, 130 Fed. 782 (D. C. Iowa); inferentially on the facts, discharge not refused, In re Allendorf, 12 A. B. R. 324, 129 Fed. 981 (D. C. Iowa); instance, In re Kaplan & Skwersky, 15 A. B. R. 534, 141 Fed. 463 (D. C. Pa.); instance, In re Levey, 13 A. B. R. 312, 133 Fed. 572 (D. C. N. Y.); In re Darevski, 22 A. B. R. 571, 171 Fed. 288 (D. C. Pa.); In re Hardie & Co., 16 A. B. R. 313, 143 Fed. 421 (D. C. Tex.); reversed on other grounds, sub nom. *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed. 588 (C. C. A.); In re Kretz et al., 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.); In re Miller, 27 A. B. R. 606, 192 Fed. 730 (D. C. Ia.); In re Cantor, 26 A. B. R. 859 (Sp. M. N. Y.); In re Taft & Conyers, 25 A. B. R. 600, 182 Fed. 899 (D. C. Ga.); In re Augspurger, 25 A. B. R. 83, 181 Fed. 174 (D. C. Ohio); In re Puschkin, 25 A. B. R. 742, 183 Fed. 882 (D. C. N. Y.). Compare, In re Dunfee, 30 A. B. R. 721, 206 Fed. 745 (D. C. N. Y.). Compare In re [R. L.] Foster, 24 A. B. R. 363 (D. C. Mass.), quoted post at § 2555.

The original bill of the proposed amendment read as follows: "Section 14b * * * or (3) obtained property on credit (which has not been paid for or restored at any time the petition is filed by or against him), upon a mate-

rially false statement in writing made (by him) to (any) person for the purpose of obtaining credit, or of being communicated to the trade, or to the person from whom he obtained such property on credit."

Releasing Bankrupt from Debts Not Included in "False Statement" for the Purpose of Curing Statement.—It was held in one case, where the bankrupt made a false statement in writing as to his financial condition by omitting therefrom certain of his debts, that it was no defense that he afterwards secured and filed in the bankruptcy court releases of the debts omitted, thus rendering the statement, originally false, true, the court saying that inasmuch as he made the statement for the purpose of securing credit, the bar to his discharge became complete and absolute at that time and could not be affected by the subsequent releases. *Josephs v. Powell & Campbell*, 32 A. B. R. 222, — Fed. — (C. C. A. N. Y., reversing In re Josephs, 30 A. B. R. 586, 205 Fed. 548, D. C. N. Y.).

24. In re Arenson, 28 A. B. R. 113, 195 Fed. 609 (D. C. N. J.).

Releasing the Bankrupt from Claims Founded on False Statement Estopping Creditor from Opposing Discharge.—It has been held in one case that where a creditor, for valuable consideration, released a debtor from all claims raised out of a false statement he had made to the creditor, such creditor thereupon surrendering the statements, the creditor will be estopped from opposing the bankrupt's discharge on that ground. In re Russell, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.). But, if such sur-

In re Scott, 11 A. B. R. 327, 126 Fed. 981 (D. C. Del.): "Where S. in September, 1902, obtained property on credit from a firm upon a materially false statement in writing made to such firm for the purpose of obtaining such property on credit, and in March, 1903, was adjudged a bankrupt on his own petition, and subsequently applied for a discharge; held, that by virtue of the Act of February 5, 1903, amendatory of the Bankruptcy Act of July 1, 1898, a specification in opposition filed by the firm, which had proved its claim, setting up such obtaining of property, presented a bar to his discharge."

Firestone v. Harvey, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio): "This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired 'on credit.' The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon a credit."

§ 2557. New Ground, Only Available in Bankruptcies Instituted Since Amendment.—This was not a ground for barring discharge before the amendment of 1903.²⁵

In re Scott, 11 A. B. R. 327, 126 Fed. 981 (D. C. Del.): "The bar to a discharge resulting from obtaining property on credit on a materially false statement in writing is a novel feature of the bankruptcy legislation of the United States. Nothing like it is to be found in any of the earlier Bankruptcy Acts, whatever analogies, remote or close, they may contain."

Nor in any former Bankruptcy Act of the United States or of England.²⁶ And it was not an available ground in bankruptcies instituted before the amendment.²⁷

§ 2558. Statement before Amendment Sufficient if Proceedings Instituted after Amendment.—Although the statement was made before the amendment of 1903 made such statements ground for barring discharge, yet it is sufficient to bar discharge in proceedings instituted since the amendment.²⁸

In re Dresser, 13 A. B. R. 639, 144 Fed. 318 (D. C. N. Y.): "I think there is nothing in the point that the statement was made before the amendment of

render and passing of consideration were made in withholding from opposition to discharge, the whole transaction might be illegal under § 29b, if the other facts warranted.

25. In re Steed & Curtis, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.); In re Harr, 16 A. B. R. 216, 143 Fed. 421 (D. C. Mo.); Firestone v. Harvey, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio).

26. In re Dresser & Co., 13 A. B. R. 619, 144 Fed. 318 (Special Master N. Y.); In re Harr, 16 A. B. R. 216, 143 Fed. 421 (D. C. Mo.); Peck v.

Lowenbein, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.).

27. In re Dauchy, 10 A. B. R. 527, 122 Fed. 688 (D. C. N. Y.).

28. In re Petersen, 10 A. B. R. 355 (D. C. Minn.); inferentially, In re Goodhile, 12 A. B. R. 380, 130 Fed. 782 (D. C. Iowa); inferentially, In re Neely, 12 A. B. R. 407, 134 Fed. 667 (Ref. N. Y.); inferentially, In re Carleton, 12 A. B. R. 475, 131 Fed. 146 (D. C. Mass.); obiter, In re Allendorf, 12 A. B. R. 324, 129 Fed. 981 (D. C. Iowa); In re Simon, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.).

the Bankruptcy Act, in 1903, went into effect. A discharge in bankruptcy is an act of grace, and Congress can impose such conditions upon granting a discharge as it sees fit. There is nothing analogous between a law preventing a discharge because of an act done before the law was passed and an *ex post facto* law."

In *re Scott*, 11 A. B. R. 327, 126 Fed. 981 (D. C. Del.): "In order that a statute may have a retroactive operation, there must be some subject on which it may retroact. But the Amendatory Act does not undertake to provide for the recovery of the property so obtained on credit, or to set aside or otherwise affect the transaction. Subdivision 3, in its relation to cases commenced after its passage, where the property was obtained prior thereto, certainly is not an *ex post facto* law, nor does it violate or disturb any vested right of the bankrupt or his creditors. A bankrupt can have no vested right to a discharge until the conditions required by law to authorize it have been satisfied. A statute is not necessarily retroactive or retrospective because its operation in a given case may be dependent upon an occurrence anterior to its passage, or, in the language of Endlich, 'because a part of the requisites for its action is drawn from a time antecedent to its passing.'"

§ 2559. Whether Other than Particular Creditor Defrauded May Oppose on This Ground.—Whether any other than the person thus parting with the property may oppose the discharge on this ground, is a question.²⁹

This query illustrates the lack of scientific basis for the addition of this ground of opposition by the amendment of 1903. It is easy enough to see that the particular creditor harmed by the false representations should have his claim excepted from the operation of the discharge, but why other creditors should be entitled to take advantage of a wrongdoing of the bankrupt that did not harm them at all but rather benefited them by the *pro tanto* enrichment of the bankrupt's estate, it is exceedingly difficult to understand. It would seem that, logically, the grounds for refusing a bankrupt's discharge should be limited to those acts which tend to deplete the estate and to make the discovery of its true condition difficult; to those acts which affect the creditors in general, and not merely particular creditors. For the particular creditor the remedy should be the excepting of his claim from the operation of the discharge.

However, the basis of this bar may be that the moral turpitude of such conduct demonstrates the bankrupt's general unfitness for commercial intercourse.

Compare, *Gilpin v. Natl. Bank*, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa.): "But it is not without significance to inquire why an incorrect statement, innocently made to one creditor, should bar the discharge of the bankrupt as to his other debts, whatever its effect as to the debt of that particular creditor. In *In re Carton & Co.*, supra, the court says: 'It is the act of issuing a materially false statement and the fraudulent intent of the man who issues it, that the statute seeks to punish by refusing a discharge. It

²⁹. Compare, *In re Dresser & Co.*, 13 A. B. R. 639, 144 Fed. 318 (D. C. N. Y.); compare, impliedly, *In re Alledorf*, 12 A. B. R. 324, 129 Fed. 981 (D. C. Iowa).

should not depend upon the whim or good nature of any particular creditor to whom the false statement was made, whether the offending bankrupt should be given or refused his discharge. Any party in interest who chooses to bring the wrongful act to the attention of the court, and proves that it was wrong within the meaning of the statute, is entitled so to do. We fully concur in the meaning thus attributed to the clause in question. The bankrupt who has made to a creditor, for the purpose of obtaining credit, a false statement—that is, one intentionally and knowingly untrue, is unworthy of the privilege of a discharge under the act, and the court will act upon information brought to it of such an act by any party in interest. It will be at once conceded on all hands, that such a bankrupt is unworthy, and should not receive the favor accorded by the law to the honest but unfortunate debtor."

In view of the fact that opposition to discharge should be available to any creditor not estopped, as also in view of the wording of the statute, "obtained from any person," it would seem that any party in interest might oppose the discharge on this ground, even though the representations were not made to him, nor the credit nor goods given by him.³⁰

In *re Carton & Co.*, 17 A. B. R. 352, 148 Fed. 63 (D. C. N. Y.): "It should not depend upon the whim or good nature of any particular creditor to whom the false statement was made whether the offending bankrupt should be given or refused his discharge. Any 'party in interest' who chooses to bring the wrongful act to the attention of the court and proves that it was wrong within the meaning of the statute is entitled so to do."

In *re Kretz et al.*, 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.): "The objecting creditors were clearly parties in interest, and therefore entitled to object, under the statute, to the discharge, for the statute reads that the false statements, if made to 'any person' prevent discharge, and are therefore sufficient to require the refusal of the bankrupt's discharge, although not made to one of the objecting creditors."

Obiter, *Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills., affirmed sub nom. *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31): "Any creditor may therefore urge this objection, whether he was the defrauded party or not."

Of course the defrauded creditor would not be permitted to withhold such false written statements from evidence as being "private property" or "confidential communications" concerning another person's financial condition.

§ 2560. First Element "Materially False Statement in Writing."—

It is an essential element of this bar to discharge that a materially false statement in writing should have been made.³¹

30. In *re Harr*, 16 A. B. R. 213, 143 Fed. 421 (D. C. Mo.); In *re Shaffer*, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.); In *re Miller*, 27 A. B. R. 606, 192 Fed. 730 (D. C. Ia.); In *re Pinsker*, 25 A. B. R. 494 (Sp. M. N. Y.).

31. In *re Kretz et al.*, 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.). *Obiter*, discharge not refused, for other grounds lacking, In *re Allendorf*, 12

A. B. R. 324, 129 Fed. 981 (D. C. Iowa).

Instance, statement omitting loans by relatives and friends although aggregate of such loans would not materially have curtailed the bankrupt's line of credit, In *re Brener*, 20 A. B. R. 644 (Ref. N. Y.).

Other instances of omitting loans from relatives. *Josephs v. Powell & Campbell*, 32 A. B. R. 222 213 Fed.

In re Walter W. Chamberlain, 25 A. B. R. 37, 180 Fed. 304 (D. C. N. Y.): “* * * the grounds of refusing a discharge in bankruptcy are statutory and limited, and do not cover general dishonesty, or unfair and sharp dealing with creditors, or oral misrepresentations made in obtaining property on credit.”

“False,” in this connection means more than merely “untrue” or “incorrect,” it implies guilty knowledge and intentional deceit.³²

Gilpin v. National Bank, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa., reversing In re Gilpin, 20 A. B. R. 374): “We fail to perceive any sufficient ground for denying to * * * the general characteristic of personal misconduct that attaches to all the others, * * *. It would indeed be a harsh construction, and at variance with the general policy of the Bankruptcy Act, that would make the conduct described in clause 3 an exception in this respect to the whole category of acts which may severally deprive the bankrupt of his privilege of discharge. * * * But apart from the incongruity imported into this section of the Bankruptcy Act by such construction, it seems to us clear that the plain language of this third clause of § 14b requires that the written statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, ‘false statement’ denotes a guilty scienter on the part of the bankrupt. This primary and ordinary meaning of the word ‘false’ cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives its primary meaning: ‘Uttering falsehood; unvaracious; given to deceit; dishonest.’ As an adjective, it is correlative with the noun ‘falsehood.’ To charge a person with making a false statement, is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged. It is true that the word may have a secondary meaning in certain collocations, and be merely equivalent to ‘untrue’ or ‘incorrect.’ But this is not the ordinary or usual signification attached to the word. To charge a person with making false entries in books of account, means something more than that incorrect or untrue entries have been made, and it has been so held by the courts in the consideration of offenses of that character. The last edition of Bouvier’s Law Dictionary says of the word ‘false,’ that when ‘applied to the intentional act of a responsible being, it implies a purpose to deceive. In Black’s Law Dictionary, under the title ‘false,’ it is said: ‘In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud.’ In a recent and well accepted publication called ‘Words and Phrases,’ the word ‘false’ is thus defined: ‘False means that which is not

627. (C. C. A. N. Y., reversing In re Josephs, 30 A. B. R. 586); In re Arenson, 28 A. B. R. 113, 195 Fed. 609 (D. C. N. J.).

Instance, false statements not in writing, In re Lewis, 20 A. B. R. 711, 163 Fed. 137 (D. C. N. Y.).

Instance held not material, In re Seligman, 20 A. B. R. 774, 163 Fed. 549 (D. C. N. Y.).

32. In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.); Hardie v. Dry Goods Co., 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex.); In re Collins, 19

A. B. R. 688, 157 Fed. 120 (D. C. Ark.); In re Shaffer, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.); In re Arenson, 28 A. B. R. 113, 195 Fed. 609 (D. C. N. J.).

Compare cases of reclamation of goods obtained by false representations, ante, § 1879.

Salesman Reading Off Long Printed List and Taking Down Bankrupt’s Answers Himself.—Compare, analogously (refusal of reclamation), Ellet-Kendal Shoe Co. v. Ward, 26 A. B. R. 114, 187 Fed. 982 (C. C. A. Okla.).

true, coupled with a lying intent.' *Wood v. The State*, 48 Ga. 192, 297, 15 Am. Rep. 664. 'False' in jurisprudence usually imports something more than the vernacular sense of 'erroneous' or 'untrue.' This and other citations in the petitioner's brief, establish a jurisprudential meaning to the word 'false' at variance with that adopted by the learned judge of the court below. No good reason has been suggested why Congress should have made such an exception to the character of the acts enumerated, as severally barring the discharge of the bankrupt, by using the word 'false' in some other than its primary and obvious meaning."

The false statement in writing which is enough to deny a discharge implies a statement knowingly false or made recklessly without an honest belief in its truth and with a purpose to mislead or deceive and thereby obtain from the person to whom it was made, property upon credit.³³

Peck v. Lowenbein, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.): "It is the evident purpose of the Bankruptcy Act to protect the unfortunate class of debtors who are unable to pay their debts, by giving them a discharge, thus affording them an opportunity to engage in business again, while, on the other hand, it is manifestly intended to deny a discharge to those whose conduct has been such as to show that they obtained credit by false statements calculated and intended to deceive and thereby defraud their creditors. Construing the act with these ends in view, it would be manifestly unjust to deny a discharge to a debtor when it appears, as it does in this instance, that the statement which he made was not actuated by any fraudulent purpose."

But compare, *In re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.): "The clause of the Bankruptcy Act that we are considering does not require that the false property statement shall have been made with any definite intention to defraud, or with any specific intent. *In re Gilpin*, 20 A. B. R. 374, 160 Fed. 171."

The bankrupt's valuation of his assets should not be so grossly inaccurate as to be suggestive of fraud.

In re Ellerbe, 29 A. B. R. 87, 198 Fed. 952 (D. C. Ga.): "If the indebtedness of the bankrupt had increased from \$10,550 to \$16,046.31 between August and December, as indicated by the master, there should be some explanation as to how the indebtedness was increased this large amount without a corresponding increase in assets. But, even passing this by, it could hardly be said that the very remarkable overestimate in the value of the real estate could have been a mere mistake of the bankrupt. It must have been overestimated for a purpose, and that purpose, it must be concluded, was to obtain credit."

And where the only proof that the statement is false is the fact that the bankrupt's assets on being later disposed of by the trustee did not bring an amount equal to the net worth of the bankrupt as set forth in the statement made at some prior time, it will be held insufficient to warrant the denial of the discharge.³⁴

³³. *In re Simon*, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.); *Firestone v. Harvey*, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio), quoted at § 2556; *Gilpin v. Merchants' National Bank*, 21 A.

B. R. 429, 162 Fed. 607 (C. C. A.), quoted this same section.

³⁴. *In re Main*, 30 A. B. R. 547, 205 Fed. 421 (D. C. Iowa).

"Materiality" in this connection has reference to the correctness of the statement and not to the amount of credit obtained, so that it is immaterial whether the credit secured was large or small.³⁵

§ 2561. Written Statement Need Not Be Delivered if Contents Communicated.—If such written statement were made, it is not necessary that it shall have been delivered; it is sufficient if it shall have been communicated.

In *re Dresser*, 16 A. B. R. 563, 146 Fed. 383 (C. C. A. N. Y.): "And it is none the less 'made,' although the statement itself is not delivered when its contents are correctly communicated by the agent. The purpose of Congress in prescribing a written statement to be essential was to protect the bankrupt from the danger of having his statement perverted or distorted by parol evidence, and that purpose is equally well accomplished whether the statement itself is used in obtaining the property, or whether the contents are communicated. The language of the clause does not necessarily import that the statement shall have been made for the purpose of inducing any particular person to rely upon it.

"The phraseology of the clause in its entirety is consistent with the interpretation which we have thus indicated. We are asked to read it as though instead of the word 'made' Congress had used the word 'delivered.' The use of that word would have required a very different construction to be placed upon the clause, and if Congress had intended such a construction, it is to be assumed that the word would have been used."

§ 2562. Second Element: Must Be by Bankrupt.—It is an essential element of this bar that the statement be made by the bankrupt or by his authority.³⁶

And it was held in one case, where the bankrupt as president of a corporation made a materially false statement in writing as to the financial condition of the corporation upon which he secured money, that the writing was made "by him" within the meaning of the act, and hence a bar to his discharge as an individual.³⁷

§ 2563. But if Made by Agent with Bankrupt's Authority, Sufficient.—A statement made by an agent, with the bankrupt's authority, is sufficient;³⁸ provided it be known to the bankrupt to be false,³⁹ or the bankrupt be guilty of such recklessness and carelessness in regard thereto as to raise the presumption that he connived at the false statement.⁴⁰ But

³⁵. In *re Arenson*, 28 A. B. R. 113, 195 Fed. 609 (D. C. N. J.).

³⁶. In *re Shaffer*, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.).

³⁷. In *re Bleyer*, 32 A. B. R. 98, 210 Fed. 391 (D. C. N. Y.).

³⁸. In *re Goodhile*, 12 A. B. R. 383, 130 Fed. 782 (D. C. Iowa); In *re Savarese*, 31 A. B. R. 758, 209 Fed. 830 (C. C. A. N. Y.).

³⁹. In *re Hardie & Co.*, 16 A. B. R. 313, 143 Fed. 607 (D. C. Tex.); *Gilpin v. National Bank*, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa., reversing, In

re Gilpin, 20 A. B. R. 374, 160 Fed. 171), quoted at § 2560; apparently, In *re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.); Impliedly, *obiter*, *Frank v. Michigan Paper Co.*, 24 A. B. R. 261, 179 Fed. 776 (C. C. A. Md.), quoted post, § 2563; In *re Schwartz & Co.*, 28 A. B. R. 670 (Ref. N. Y.); *Ragan, Malone & Co. v. Cotton & Preston*, 29 A. B. R. 597, 200 Fed. 546 (C. C. A. Ga.).

⁴⁰. In *re Simon*, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.). Compare, In *re Savarese*, 31 A. B. R. 758, 209 Fed. 830 (C. C. A. N. Y.).

it is not sufficient if not made with the bankrupt's authority.⁴¹

In *re Dresser*, 16 A. B. R. 561, 146 Fed. 383 (C. C. A. N. Y.): “* * * within the fair meaning of the clause the statement is made to such person if it was given to an agent for the purpose of using it in obtaining property for the bankrupt, and if its contents were communicated by the agent to such person. The words ‘such person’ refer to the previous words ‘any person,’ and the statement is ‘made to such person’ whenever it is made by the bankrupt himself or his duly authorized agent.”

And it has been held that one partner will not be barred of his discharge by false statements made by his copartner of which he was ignorant and which were not made by his authority.⁴²

And it also has been held under such circumstances, that a false statement made by one partner, even in the regular course of the partnership business, does not constitute a bar to the discharge of the firm.⁴³

Frank v. Michigan Paper Co., 24 A. B. R. 261, 179 Fed. 776 (C. C. A. Md.): “Under the existing statute the question of what will bar a discharge has now been passed upon by at least three different Circuit Courts of Appeals, and all of these decisions are in substantial harmony in holding that the bar to a discharge by reason of a false statement in writing, is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person was a member. In *Hardie v. Swafford Bros. Dry Goods Co.*, * * * in a case in every way similar to the one at bar, held that a materially false statement in writing made by a partner in the ordinary course of business of the partnership for the purpose of obtaining goods on credit, and by means of which they were so obtained by the firm, is not ground for refusing a discharge in bankruptcy under Bankruptcy Act, July 1, 1898. It must be manifest that the intent to deceive can never be imputed to one who not only takes no part in making the written statement, but, as in the case at bar, knows nothing of it. We believe that the view taken by the Circuit Court of Appeals for the Third Circuit of the meaning of the word ‘false’ as used in this section, is the correct one, and the decision above referred to is in entire harmony with the *Lowenbein* case decided by this court. Taking the view that the right to a discharge is determined by the good faith of the bankrupt, and that the effect of such discharge, is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents, we come

41. Compare, *In re Schultz*, 6 A. B. R. 91, 109 Fed. 264 (D. C. N. Y.), as to agent's acts not imputable to bankrupt principal unless within scope of agency. *In re Dresser*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.). See ante, §§ 2484, 2485.

42. See ante, § 2484. *In re Dresser*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.). Contra, *In re Hardie & Co.*, 16 A. B. R. 313, 143 Fed. 607 (D. C. Tex.). *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed.

588 (C. C. A. Tex., reversing *In re Hardie*, 16 A. B. R. 313, 143 Fed. 607). Compare, *Peck v. Lowenbein*, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.). *In re Cotton & Preston*, 25 A. B. R. 517, 183 Fed. 181 (C. C. A. Ga.). Compare, *In re Simon*, 29 A. B. R. 803, 197 Fed. 105 (D. C. N. Y.); *In re Cotton & Preston* (No. 1), 25 A. B. R. 517, 183 Fed. 181 (D. C. Ga.).

43. *In re Cotton & Preston* (No. 1), 25 A. B. R. 517, 183 Fed. 181 (D. C. Ga.).

to the conclusion that the court below erred in refusing to grant a discharge to the bankrupt."

But clearly the partner will be barred of his discharge, if he have knowledge of the false statement,⁴⁴ or if it were made by his authority.

And, in general, where the making of a statement as a basis of credit is within the scope of the agent's authority the better rule would seem on principle to be that the principal cannot avoid liability because of his actual ignorance of the making of the statement or of the falsity thereof;⁴⁵ thus, where a son carries on his mother's business.⁴⁶

§ 2564. Third Element: Must Be Made to Person from Whom Credit Obtained.—It is a further element, necessary to complete this bar to discharge, that the statement shall have been made to the person from whom the credit was obtained;⁴⁷ or to the agent of such person.

§ 2565. Whether, if Made to Mercantile Agencies, or in Answer to General Inquiries, a Bar.—False general statements to mercantile agencies, or in answer to general inquiries, will be insufficient to bar discharge.

In *re Kretz et al.*, 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.): "As the false representations under the last act must be made to the person, or the representative of the person, from whom money or property was obtained on credit, without a finding or evidence that the mercantile agencies were, in some sense, the representatives of the creditor from whom money or property was obtained, or the representations made to them were, in some way, communicated to the creditor or relied upon by the creditor, the report to the master is approved as to the insufficiency of the objection to discharge so far as based upon false representations made to the commercial agencies."

In *re Foster*, 24 A. B. R. 368, — Fed. — (D. C. Miss.): "A statement in writing by a bankrupt to a mercantile agency though false, will not bar his discharge unless the bankrupt referred the prospective creditor to the said statement as being a true statement of his financial condition, made for the purpose of obtaining credit." [This rule is incomplete unless it be further qualified by the clause "and unless such creditor delivered the goods in reliance upon what was found therein stated."]

⁴⁴. In *re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.).

⁴⁵. In *re Reed*, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

⁴⁶. In *re Reed*, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.).

⁴⁷. *Obiter*, In *re Dresser*, 16 A. B. R. 561, 146 Fed. 383 (C. C. A. N. Y.); In *re Napier*, 23 A. B. R. 560 (Spec. Master, Ky., affirmed by D. C.); In *re [R. L.] Foster*, 24 A. B. R. 368 (D. C. Mass.), quoted post at § 2565. But compare *obiter* in In *re Dunfee*, 30

A. B. R. 721, 206 Fed. 745 (D. C. N. Y.), that since the amendment of 1910 it is only necessary to obtain credit from the person to whom the statement is made.

Bankruptcy Act as amended 1910, § 14 (b) (3): "Or, 3, obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

Especially where it does not appear that the "agency" was the agent either of the bankrupt or of the creditor.⁴⁹

In *re Russell*, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.): "The signed statement of January 26th, 1907, was made by Russell to the Bradstreet Company, was filed with it and never delivered to the Trust Company, or apparently seen by them before the trial. It is contended, therefore, that this statement is not within the language of the agreement. In considering this suggestion it will be useful to refer to the statute. * * * This provision was incorporated by Amendment in 1903. Its language is precise and evidently chosen to restrict the scope of the provision, so that no loose construction might extend it beyond what Congress intended to enact when it added an objection, the like of which appears in no previous bankruptcy law. This is apparent not only from the choice of words but also from the history of the amendment; as it left the house it contained the clause 'or of being communicated to the trade,' that clause was struck out in the Senate and the House concurred in thus restricting it. * * * It would seem from this that the ordinary statement of financial condition made to a mercantile agency for general circulation among its enquiring subscribers would not be within the statute."

Obiter, In *re Carton & Co.*, 17 A. B. R. 343, 148 Fed. 63 (D. C. N. Y.): "The usual commercial agency report obtained by an agency in order that it may give the new merchant a 'rating' and for general distribution among its customers, cannot be made the basis of successful action by an objecting creditor. * * * But when an agency applies to a merchant for a specially signed report on his condition he must know that such report is for the special purpose of enabling those who vend him goods to decide upon his financial responsibility."

Obiter, In *re Dresser & Co.*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.): "If the Ray bill had become a law as proposed, the objection of the creditors herein would unquestionably be sustained. It would be sufficient in that event, to show that Dresser & Co. obtained property on credit from some person, and the materially false statement in writing need only to have been made by them to any person for the purpose of obtaining credit, or to any person for the purpose of being communicated to the trade, or to the person from whom they obtained credit. * * * It will be observed that false statements made to mercantile agencies, or in answer to general inquiries, or for general circulation, are eliminated from among the grounds of objection to discharge."

On the other hand it has been ruled that a false written statement to a commercial agency, made with intent to procure credit, may be sufficient to bar discharge;⁵⁰ that the bankrupt need not have intended to deceive any particular person, but that it is sufficient if he intended to deceive any person of a group, whether the person or group were known to him or not.⁵¹

⁴⁹. *Novick v. Reed & Co.*, 27 A. B. R. 521, 192 Fed. 20 (C. C. A. Pa.).

⁵⁰. In *re Augspurger*, 25 A. B. R. 83, 174 Fed. 181 (D. C. Ohio); In *re Pincus*, 17 A. B. R. 331, 114 Fed. 621 (D. C. N. Y.).

⁵¹. In *re Dresser*, 16 A. B. R. 561, 146 Fed. 383 (C. C. A. N. Y.); In *re*

Dresser, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.); In *re Pinsker*, 25 A. B. R. 494 (Sp. M. N. Y.).

Compare, to similar effect, In *re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.), quoted at § 2560, note.

In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.): "The statement, as made, is thus shown to have been untrue, and the purpose of it being to secure commercial credit, if it was intentionally so and property was in fact obtained on the strength of it, a case is made out within the terms of the statute, and the bankrupt cannot expect a discharge in the face of it. It is of no consequence in this connection that the statement was made to Dun & Company and not to a creditor. The object of the bankrupt was to secure a favorable rating in the reports of the commercial agency, and in that way to reach its subscribers and customers. This he very well understood and acted upon, as is shown by his letters to various parties. And in so doing it was the same in fact, as in legal effect, as if he had made the statement direct to the parties who relied on it. * * * He sent it in to Dun & Company, as the opening sentence shows, to obviate unfavorable reports with regard to his financial standing, which had previously emanated from this agency, and thus took upon himself the consequences."

However, these latter cases, on their facts, will appear either to have been decided in accordance with the leading proposition, or else to have had special circumstances which took them out of the ordinary rule.⁵²

In passing the Amendment of 1910, Congress refused to make false general statements to mercantile agencies ground for refusing discharge. The amendment as it originally came from the House of Representatives, read as follows, to-wit:

"Or, (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person for the purpose of obtaining credit or of being communicated to the trade or to the person of whom he obtained such property on credit."

The Senate, however, following much the course it pursued at the time the similar Amendment of 1903 was up for passage, refused to concur in this amendment and substituted the present wording, in which the House finally concurred. The refusal of the senate was based expressly upon the ground that it would be too harsh to make ground of opposition to discharge mere general statements to a mercantile agency, even though falsely made; and the present wording was adopted as emphasizing this attitude. It is a mistake, however, to consider that the present amendment would protect a bankrupt in making false statements to a mercantile agency, in any and all events; for, where a creditor has specifically asked a mercantile agency to procure a statement from the prospective debtor, as a basis for credit, undoubtedly a false statement made to such mercantile agency by the debtor, whilst not made by him to the creditor himself would, nevertheless, be made to "his representative" and be within the prohibition of the law.

Report No. 691 of Senate Judiciary Committee, 61st Congress: "The third

52. These cases distinguished in In re Russell, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.), quoted *supra*, and Novick v. Reed, 27 A. B. R. 521,

192 Fed. 20 (C. C. A. Pa.). Compare In re Simon, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.).

change made by the House bill, that which in effect would make the obtaining of property on false written statements to mercantile agencies ground of opposition to discharge, without the creditor whose property has thus been obtained first asking such mercantile agencies to procure him the written statement, is not concurred in by your committee. Any tendency to make the bankrupt Act unduly harsh is to be avoided. It is sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing where that statement was specifically asked for by the creditor or by creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors, ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your committee. Merchants are likely to make careless general statements where they would be very careful were they making statements to creditors from whom they were at the time asking credit. Your committee propose a substitute for the House amendment of this ground of opposition to discharge, which is thought to go as far as is proper."

§ 2566. Fourth Element; Money or Other Property Must Be Obtained on Credit Thereby.—It is essential, furthermore, that the bankrupt shall have obtained money or other property on credit thereby.⁵³ Even before the Amendment of 1910, "property" was held to include "money" borrowed on credit.⁵⁴

But if the bankrupt does not receive the identical property parted with on the faith of the false representations, but merely derives some benefit therefrom, it seems, nevertheless, to be sufficient.⁵⁵

§ 2567. Fifth Element: Bankrupt Must Intend to Obtain Credit Thereby.—It is also a necessary element to complete the bar, that the bankrupt shall have intended to obtain credit thereby.⁵⁶

^{53.} *Obiter*, In re Dresser & Co., 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y.); *Firestone v. Harvey*, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio), quoted at § 2556; instance, facts held sufficient, In re [Thomas S.] Wyllly, Jr., 32 A. B. R. 145, 210 Fed. 954 (D. C. N. Y.); In re McLellan, 30 A. B. R. 325, 204 Fed. 482 (D. C. N. Y.); In re O'Callaghan, 29 A. B. R. 304, 199 Fed. 662 (D. C. Mass.); In re Sabsevit, 28 A. B. R. 623, 197 Fed. 109 (D. C. N. Y.).

Obtaining Surety or Indemnity Bond by False Statement in Writing.

—It has been held in one case that a surety or indemnity bond is not "property" as that term is used in § 14 (b) (3), In re Tanner, 27 A. B. R. 615, 192 Fed. 572 (D. C. Wash.). But compare, though *obiter*, In re Dunfee, 30 A. B. R. 721, 206 Fed. 745 (D. C. N. Y.): "I am of the opinion that, when A. induces B. to sign his bond or note as surety, he has obtained 'credit' from such person. When he obtains that credit by false and fraudulent representations made in writing, and

uses that credit to obtain money or property from another for himself on a promise to repay in a certain event, he has obtained such money or property on or by means of a materially false statement in writing made by him to the surety (any person) for the purpose of obtaining, not money or property from such person, the surety, which is not required by the statute, but for the purpose of obtaining credit from such person, the surety, which is all that section 14b (3) requires to defeat a discharge." Compare post, § 2747, note 123.

^{54.} In re Gilpin, 20 A. B. R. 374, 160 Fed. 171 (D. C. Pa.); In re Pfaffinger, 19 A. B. R. 309, 154 Fed. 328 (C. C. A. Ky.).

^{55.} *Obiter*, In re Dresser & Co., 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y.).

^{56.} In re Seligman, 20 A. B. R. 77, 163 Fed. 549 (D. C. N. Y.); impliedly, In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.); In re O'Callaghan, 29 A. B. R. 304, 199 Fed. 662 (D. C. Mass.).

Firestone v. Harvey, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio): "This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired 'on credit.'"

§ 2568. **Whether Intent Must Be to Obtain Particular Property Actually Obtained.**—It is a question whether the intent of the bankrupt must have been a particular intent or a general intent; that is to say, whether it must have been to obtain the particular property in question, or to obtain general credit.⁵⁷ By the wording of the Amendment of 1910, it would seem that the purpose denounced is a purpose to obtain "credit."^{57a}

§ 2569. **Sixth Element: False Statement Must Be Relied on.**—If the false statement was not relied on in parting with the property, the discharge will not be barred.⁵⁸

But reliance may be proved by circumstantial evidence and the mere facts that the statement was asked for and furnished as a basis of credit and that the goods were supplied within a reasonable time thereafter are sufficient proof that the creditor parted with the merchandise on the strength of the representation, in the absence of sufficient rebutting evidence.

In *re Reed*, 26 A. B. R. 286, 191 Fed. 920 (D. C. Okla.); "It was not shown by direct testimony that the objector parted with the merchandise in reliance upon it. No witness testified to the fact. But it was competent to establish the fact by circumstantial evidence. The statement was asked and furnished as a basis for credit, and the relation between the representation and the shipment of the merchandise was so close that the conclusion is only reasonable that the creditor parted with the merchandise on the strength of the representation. The evidence amply sustains the finding that such was the fact, and the fact ought to be so found in this case where there is an absence of any showing to the contrary. The holding that there was no evidence that the creditor relied upon the statement overlooks the probative force and weight of the evidence introduced. Reliance on the statement was sufficiently proven."

§ 2570. **"Continuing Representations."**—Unless the representations are shown to have been continuing representations, the subsequent parting with other property in reliance upon the financial condition remaining the same will be insufficient.⁵⁹

⁵⁷. That it will be sufficient if made simply to obtain general credit, impliedly, In *re Pincus*, 17 A. B. R. 331, 147 Fed. 621 (D. C. N. Y.). Also, Bankr. Act, as amended in 1910, § 14 (b) (3), quoted at § 2564; In *re Braverman*, 28 A. B. R. 513, 199 Fed. 863 (D. C. N. Y.).

^{57a}. In *re Dunfee*, 30 A. B. R. 721, 206 Fed. 745 (D. C. N. Y.).

⁵⁸. In *re Dresser*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y.); impliedly, In *re Kaplan & Skwersky*, 15 A. B. R. 534, 141 Fed. 463 (D. C. Pa.); In *re Shaffer*, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.); In *re Kretz et al.*, 32 A. B. R. 365, 212 Fed. 784 (D. C.

Wash.); In *re Main*, 30 A. B. R. 547, 205 Fed. 421 (D. C. Iowa); In *re O'Callaghan*, 29 A. B. R. 304, 199 Fed. 662 (D. C. Mass.); In *re Mintzer*, 28 A. B. R. 743, 197 Fed. 647 (D. C. N. Y.); In *re Sabsevit*, 28 A. B. R. 623, 197 Fed. 109 (D. C. N. Y.). Compare, In *re Braverman*, 28 A. B. R. 513, 199 Fed. 863 (D. C. N. Y.); instance, statement held to have been relied upon, In *re [Thomas S.] Wylly, Jr.*, 32 A. B. R. 145, 210 Fed. 954 (D. C. N. Y.).

⁵⁹. Compare, In *re Dresser & Co.*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y.). Instance held continuing, In *re Kyte*, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.).

In *re Allendorf*, 12 A. B. R. 324, 129 Fed. 981 (D. C. Iowa): "There is nothing in the statement, nor in the letter of the bankrupt inclosing it to the creditor, to show that it was to be a continuing statement or representation of the bankrupt's financial standing—in fact, the statement is expressly limited to his condition on September 9th, 1902—and the testimony of the creditman of this creditor and the letter of the bankrupt conclusively show that it was made to secure the bill of goods prior to September 9th only. Between that date and May 15th following (more than eight months) there was no dealing between these parties, and there is no evidence from which it can be fairly inferred that the statement was made for the purpose of obtaining the goods shipped upon the orders of May 15th and May 20th. To defeat a discharge, the bankrupt must have obtained property upon a materially false statement made in writing for the purpose of obtaining such property. The statement in question was not made for the purpose of obtaining the property shipped to the bankrupt by his creditor on May 15th, and 20th, respectively, nor any other property for which he is now owing."

But it is otherwise where it appears that the statement was intended to be a basis for the extension of continuing credit.⁶⁰

By "continuing representations," however, are not meant representations that the same condition is continuing, but representations continuing, as if reiterated, that a certain previous condition did exist at the previous time.

It is not necessary that the representations be made within the four months period preceding the bankruptcy.⁶¹

In *re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.): "It is contended by the bankrupt that, as the alleged false property statement was not made within the four months period, it therefore furnishes no just ground for objection. This doctrine seems to have been laid down by Mr. Brandenburg in his work on Bankruptcy (§ 370), but no precedent is cited to sustain the text. It will be observed that Congress, in framing the third subdivision of § 14b, has not prescribed any limitation of time. This supposed omission cannot be attributed to oversight, because in the fourth subdivision of the same section such limitation is expressly prescribed. Of course, the court cannot interpolate a condition which Congress saw fit to omit. By a careful reading of the text, however, it would appear that the bar to the discharge is not the making of such false statement, but the obtaining of property on credit based upon such written statement."

Nor is it requisite that the property shall have been obtained within the four months period.⁶²

And unless the bankrupt has indicated the length of time that the statement may be regarded as continuing, it will only continue for a reasonable time, dependant upon the circumstances and the nature of the business in which the bankrupt is engaged.

In *re Braverman*, 28 A. B. R. 513, 199 Fed. 863 (D. C. N. Y.): "The rule is this: Was the sale a proximate result of the statement? Here the earliest

60. *Ragan, etc., Co. v. Cotton & Preston*, 29 A. B. R. 597, 200 Fed. 546 (C. C. A. Ga.).

61. In *re Simon*, 29 A. B. R. 808, 197

Fed. 105 (D. C. N. Y.).

62. In *re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.), is not contra.

purchase was eighteen months after the statement and the bankrupt had failed to fill in the blank showing for how long the statement might be regarded as continuing. That failure was equivalent to a refusal to say how long it should last and left the sellers to their own construction of the facts.

"Now what does such a statement mean? That on a given date the assets and liabilities are as stated. Does that give the seller any right eighteen months thereafter to assume that the condition remains approximately as then stated? Certainly not, in view of the constantly changing fortunes of such a trade as the bankrupt's. He was a man doing a little retail shoe trade, subject to rent in New York, to the variations in business from causes over which he had no control, to all the vicissitudes which make so hazardous the commercial life of such traders. It is unreasonable to suppose that such a statement would be any index of his financial condition eighteen months after it was made."

In re O'Callaghan, 29 A. B. R. 304, 199 Fed. 662 (D. C. Mass.): "There had been a succession of transactions involving the giving of credit, and the evidence is hardly sufficient to show that anything due from the bankrupt to the Trust Company at or within four months prior to the bankruptcy had been obtained on the strength of the credit given in 1908. The statement of that year cannot be regarded as a continuing representation, and I must hesitate to hold that section 14b (3) applies, without limit of time, to any obtaining of credit, however long before the bankruptcy, and irrespective of intervening transactions with the creditor."

§ 2570½. Whether Effect of False Statement Limited to Immediate Transaction.—It is not, however, a defense to a statement false when made that the property obtained on the strength of it at the time it was made has all been paid for,^{62a} so long as the false statement is properly relied on in subsequent transactions.

SUBDIVISION "G."

PREVIOUS DISCHARGE WITHIN SIX YEARS AS BAR TO DISCHARGE.

§ 2571. Previous Discharge within Six Years, as Bar to Discharge.—The bankrupt's discharge will be barred if he has received a previous discharge within six years in voluntary proceedings.⁶³

In re Seaholm, 14 A. B. R. 292, 136 Fed. 144 (C. C. A. Mass.): "It must be observed that the idea of placing restrictions and limitations upon the number and frequency of discharges to be granted to the bankrupt upon its own application does not involve a new philosophy, nor is it a new feature of bankruptcy legislation. In the older bankruptcy statutes, both in this country and in England, refusal of the second discharge was not, as a rule, limited to situations in which the first discharge was in a voluntary proceeding, but a discharge on a second proceeding was denied when the first discharge was in an involuntary proceeding as well. Under the English Bankruptcy Act of 1890, if the bankrupt

^{62a} In re Puschkin, 25 A. B. R. 742, 183 Fed. 882 (D. C. N. Y.); also compare preceding section.

⁶³ Bankr. Act, § 14 (b) 5: "Unless he has (5) in voluntary proceedings been granted a discharge in bankruptcy within six years." In re Neely,

12 A. B. R. 407, 134 Fed. 667 (Ref. N. Y.); In re Carleton, 12 A. B. R. 475, 131 Fed. 146 (D. C. Mass.); In re Haase, 17 A. B. R. 528 (D. C. N. Y.); In re Chase, 26 A. B. R. 456, 186 Fed. 408 (D. C. Mass.); In re Lachenmaier, 29 A. B. R. 325, 203 Fed. 32 (C. C. A. Wis.).

had on any previous occasion been adjudged a bankrupt, the discharge is refused altogether, or suspended for a period of not less than two years, or until a dividend of not less than 10 shillings on the pound has been paid; and this restriction upon the second discharge results without regard to whether the earlier bankruptcy involved a voluntary or involuntary proceeding, and without regard to lapse of time between the earlier and the later proceeding.

"A similar feature was present in our own Bankruptcy Law of 1867, where a second discharge was only allowed when the bankrupt's estate was sufficient to pay 70 per cent.; the rigor of this restriction being qualified only by a provision which enabled three-fourths of the creditors to consent to a discharge upon payment of a less sum.

"The debates in Congress in connection with the proposed amendments of 1903 to the Law of 1898, enlarging the grounds for withholding a discharge, show that the amendments were directed against alleged abuses, through the frequency of bankruptcy proceedings instituted by the same individual, and from repeated discharges in bankruptcy upon the application of the bankrupt, and that such ad libitum discharges resulted from the absence of the usual restriction upon the bankrupt, which was omitted through oversight.

"The fifth clause of the amendments, as originally drawn and under debate in the House of Representatives, where it was attacked as oppressive to the bankrupt, was sufficiently comprehensive to direct itself against a discharge if the applicant had been granted or denied a discharge within six years in either voluntary or involuntary proceedings. It was as follows: 'or (5) been granted or denied a discharge in bankruptcy within six years.' The debates show that those who were against the proposed amendment, on the ground that it was oppressive, urged that a debtor ought to be discharged in an involuntary proceeding instituted by the creditors who had taken his assets, without regard to the number or the character of the previous proceedings or discharges, yet, after full debate, the amendment passed the House in its comprehensive terms, and without modification. The Senate, by amendment, modified the rigid terms of the House proposition by striking out the words 'or denied,' and inserting the words 'in voluntary proceedings,' thus presenting to the House the present clause 5, which in two substantial respects modified the House proposition: First, by omitting the words 'or denied,' thus limiting its operation to cases in which a discharge has been actually granted; and, second, by inserting the words 'in voluntary proceedings,' which withdraws its operation from cases in which the bankrupt has been discharged in a previous involuntary proceeding.

"Under the Senate amendment, it was left that the applicant shall be discharged 'unless he has * * * in voluntary proceedings been granted a discharge in bankruptcy within six years.' To the modified clause presented by the Senate, the House agreed, and it became a law.

"In view of the sweeping terms of clause 5, as originally drawn and passed by the House, and of the Senate amendment, which was merely a modification of the House policy or proposition, rather than a reversal, the conclusion is irresistible that it was not the purpose of Congress to allow a second discharge to a debtor upon his own application if the prior discharge was granted to him in a voluntary proceeding within the time limitation under which the clause operates—in other words, that it was the final intention of Congress to give the bankrupt a second discharge, on his own application, in a subsequent involuntary proceeding, only in cases where his first discharge was in an involuntary proceeding."

§ 2572. Whether Present Application Be in Involuntary or Voluntary Bankruptcy, Immaterial.—Whether the proceedings in which the present application for discharge is made are voluntary or involuntary is immaterial. It is the character of the proceedings wherein the former discharge was granted that is material.⁶⁴

In re Seaholm, 14 A. B. R. 292, 136 Fed. 144 (C. C. A. Mass.): "This appeal * * * raises the question whether the words 'in voluntary proceedings' in § 14, subsec. 'b,' cl. 5, describe or have reference to the pending proceeding, in which the bankrupt himself stands upon his second application for discharge, or to a previous and past proceeding, in which he has been discharged within six years.

"But for the ingenious and somewhat subtle contention of the appellant, the meaning of the statute in this respect would seem to be clear, as, by omitting from subsection 'b' all the grounds for refusing a discharge except the one material in this case, the statute would read, 'investigate the merits of the application and discharge the applicant unless he has in voluntary proceedings been granted a discharge in bankruptcy within six years.' Such a reading necessarily results, as the conjunction 'or' connects the subject 'he' with the verb in each of the five succeeding clauses. Each clause introduced by 'or' naturally and necessarily refers itself back to the subject 'he' and the verb 'has,' the verb 'has' obviously referring to the past. The argument, however, is made that, through possible punctuation, like introducing a comma after the word 'proceedings,' then under reasonable construction the words 'in voluntary proceedings' would have reference to the proceeding in which the second discharge was granted. We do not think the statute reasonably susceptible of such a construction; and it is quite certain that, under the well-known rules governing the interpretation of statutes, such a forced construction would not be warranted unless unmistakable and efficient historical considerations make it plain that it was so intended by Congress."

§ 2573. Previous Discharge in Involuntary Proceedings, No Bar.—If the previous discharge within six years were granted in an involuntary proceedings, it is no bar.

In re Neely, 12 A. B. R. 407, 134 Fed. 667 (Ref. N. Y.): "Having once been granted a discharge in proceedings instituted by himself, and to serve his own purposes, he precludes himself from again seeking the benefit of a discharge, in voluntary or involuntary proceedings for a period of six years."

§ 2574. In Voluntary Proceedings, It Is Bar.—If the previous discharge within the six years were granted in a voluntary proceedings, it is a bar.⁶⁵

In re Carleton, 12 A. B. R. 475, 131 Fed. 146 (D. C. Mass.): "Carleton was adjudged bankrupt upon a petition which he filed as member of a firm composed of himself and one Freeman. On October 28th, 1902, he received his discharge. On December 10th, 1903, he was again adjudged bankrupt upon his individual voluntary petition and now seeks a discharge thereunder. * * * Counsel for the bankrupt has suggested that the first adjudication was not had

⁶⁴. In re Neely, 12 A. B. R. 407, 134 Fed. 667 (Ref. N. Y.); In re Dunphy, 30 A. B. R. 760, 206 Fed. 680 (D. C. Me.).

⁶⁵. In re Neely, 12 A. B. R. 407, 134

in voluntary proceedings; but, so far as the present bankrupt is concerned, the partnership proceedings must be deemed voluntary."

§ 2575. Previous Refusal to Discharge within Six Years Not within Bar, Though Res Judicata as to Old Debts.—The bar of the statute covers only cases where a previous discharge has been granted and not where it has been refused. Nevertheless, a previous refusal of discharge, whether within the six years or before, whether in voluntary or involuntary bankruptcy proceedings, is *res judicata* as to the old debts provable in the former bankruptcy, even though also provable under the present bankruptcy.⁶⁶

§ 2576. This Bar Applicable Where Proceedings Instituted after Amendment of 1903, Though Facts Occurred Beforehand.—The amendment of 1903, thus barring repeated discharges, is applicable to all cases wherein the proceedings were begun after the passage of the amendment, even though the bar depends on facts occurring prior to its passage. It is not for that reason retroactive.⁶⁷

In *re Carleon*, 12 A. B. R. 475, 131 Fed. 146 (D. C. Mass.): "He contends chiefly that to deny the bankrupt a discharge in this case would be to give to the Ray bill a retroactive effect; but this is not true. The original Bankrupt Act * * * indeed, did not forbid successive petitions in bankruptcy and successive discharges thereunder, but it conferred upon a bankrupt no vested right to file successive petitions and to receive successive discharges which is impaired by the Ray bill. That statute is not retroactive. It creates no new offense and imposes no penalty, but only fixes new conditions of discharge in case of petitions filed after its passage. Its language is plain, and, in accordance therewith, the discharge is here refused."

But not where the petition in bankruptcy, wherein the discharge is being sought, was filed before the amendment.

In *re Seaholm*, 14 A. B. R. 292, 136 Fed. 144 (C. C. A. Mass.): "The appellant's other point is that the amendment, under such construction, is retroactive, because, under the old law, the bankrupt would be entitled to a second discharge in either a voluntary or an involuntary proceeding. It is a sufficient answer to this, we think, to say that the proceeding in which the point is taken was instituted subsequently to the amendment which changed the law.

"There was no vested right in the bankrupt to have the law stand as it was. No one would seriously question the right of Congress to modify the law, and state the conditions upon which debtors in the future could be discharged from their indebtedness, and, when the bankrupt made his application for a discharge in this proceeding, he invoked the law as it then was; and, under the statute of 1903, as we view it, the fact that he had been previously discharged from his indebtedness in a voluntary proceeding within six years was a statutory ground for withholding a second discharge upon his own application in this subsequent involuntary proceeding."

66. See § 2437, et seq.

67. In *re Neely*, 12 A. B. R. 407, 134 Fed. 667 (Ref. N. Y.).

§ 2577. Whether "Within Six Years" Measures Time between First and Second Discharge, or between First Discharge and Filing of Second Petition in Bankruptcy.—The expression "within six years," it has been held, measures the time between a first and second discharge, and not between a first discharge and the filing of a second petition in bankruptcy.⁶⁸

Yet it would seem, on principle, that the rule should be that it measures the time between the granting of the first discharge and the filing of the application for the second discharge; otherwise a bankrupt, by merely delaying the final hearing upon his second application, might overcome that which was a valid bar at the time creditors were required to file specifications of their grounds for barring the discharge. Moreover, the findings of courts ordinarily should revert to the conditions as existing at the time of the instituting of the particular application in controversy.

And the above reasoning has been approved and applied in one case in which the point was directly involved.

In *re Dunphy*, 30 A. B. R. 760, 206 Fed. 680 (D. C. Me.): "I think the language of *Remington* presents a sound view of the subject, although it is not based upon any judicial decision; nor can I find that any court has distinctly held to this view. It must be said, however, that the cases which I have cited which seem to take the opposite view present merely dicta. They contain merely cogent and forcible language of the court, and not direct judicial decision."

§ 2578. "Six Years" Does Not Measure Time between Two Adjudications of Bankruptcy.—Nor does the expression "within six years" measure the time between the two adjudications in bankruptcy, nor between the filing of the two bankruptcy petitions.

§ 2579. Jurisdiction to Administer Estate Unimpaired Though Discharge Barred because of Previous Discharge within Six Years.—The bankruptcy court has jurisdiction to administer a debtor's estate, although he has been granted a discharge within six years, whether a discharge is or is not applied for, or can or cannot be granted.⁶⁹ Indeed, this bar does not prevent the filing of any number of successive petitions in bankruptcy within the six years. It only prohibits petitions for *discharge*.⁷⁰

Similarly, an adjudication will not be vacated and a voluntary petition be dismissed, upon application of the bankrupt, who discovers his discharge is barred by a previous discharge within six years, if creditors object.⁷¹

^{68.} In *re Little*, 13 A. B. R. 640, 137 Fed. 521 (C. C. A. Ills.); In *re Jordan* 15 A. B. R. 449, 142 Fed. 292 (D. C. Pa.); In *re Haase*, 17 A. B. R. 528 (D. C. N. Y.); In *re Smith*, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.).

^{69.} In *re Little*, 13 A. B. R. 640,

137 Fed. 521 (C. C. A. Ills.).

^{70.} Compare, inferentially, In *re Barton's Estate*, 16 A. B. R. 578, 144 Fed. 540 (D. C. Dak.).

^{71.} In *re Smith*, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.). Also, see ante, §§ 2437, 2441, 2416.

SUBDIVISION "H."

REFUSAL TO OBEY COURT'S ORDER OR TO ANSWER MATERIAL QUESTION, AS
BAR TO DISCHARGE.

§ 2580. Refusal to Obey Court's Order or to Answer Question, as Bar to Discharge.—The bankrupt's discharge will be barred, if, in the course of the proceedings in bankruptcy, he has refused to obey any lawful order of the court, or to answer any material question approved by the court.⁷²

§ 2581. Refusal to Answer Incriminating Questions.—Refusal of the bankrupt to answer material questions approved by the referee, upon the ground that his answers may tend to incriminate him, has been held to be a valid objection to the bankrupt's discharge, under § 14 (b) (6).⁷³

In *re Dresser*, 16 A. B. R. 563, 146 Fed. 383 (C. C. A. N. Y., affirming *In re Dresser*, 13 A. B. R. 616, 144 Fed. 318, Ref. N. Y.): "The contention for the appellant is that to enforce clause 6 under the circumstances of this case would deprive the bankrupt of his constitutional right of immunity from self-incrimination. The proceeding for a discharge is not a criminal proceeding, and the constitutional protection extends to the protection of the witness in criminal proceedings only; and, of course, it may always be waived by the witness himself. We entertain no doubt that it is within the power of Congress to grant or to refuse a discharge to a bankrupt upon such conditions as it may deem proper. Such a privilege is not a natural right, or a right of property, but is a matter of favor to be accepted upon such terms as Congress sees fit to impose."

In *re Weinreb*, 18 A. B. R. 387, 153 Fed. 363 (C. C. A. N. Y.): "The question related to a payment of \$18,200 in cash which the bankrupts alleged they had made to a person to whom they claim that they were indebted on open account. Manifestly it was material. It was put to Weinreb on examination before the referee on January 27, 1904. No objection was made to it, but he refused to answer, on the ground that it would tend to degrade and incriminate him. The same question was put to Merker on February 17, 1904, under the same circumstances and with the same result. On March 15th each bankrupt was again asked the same question. Objection was interposed on the ground that it was 'incompetent, irrelevant, and immaterial,' but the objection was overruled by the referee and the question allowed. Each bankrupt thereupon refused to answer, on the ground that it might tend to incriminate him. On March 14th specifications in opposition to discharge were filed; one of such specifications being the refusal to answer this question. Thereafter at a hearing before the referee on April 5, 1904, without notice to the objecting creditors, and in the absence of their counsel, the bankrupts signified their willingness to answer said question and gave the name of the person inquired about. Under these circumstances, we concur with the district judge in the conclusion that their original refusal was sufficient ground for denying discharge."

No formal order by the referee to answer the question is requisite; the

⁷² Bankr. Act, § 14 (b) (6).

⁷³ In *re Dresser*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., approved by

D. C. and C. C. A.); In *re Schwartz & Co.*, 28 A. B. R. 670 (Ref. N. Y.).

refusal to answer may be the bankrupt's privilege, but he forfeits his discharge thereby. If the question is objected to on other grounds than its tendency to incriminate, and the objection is not well taken and is overruled, and the bankrupt then refuses because of its tendency to incriminate him, nothing further seems to be necessary.

In *re Weinreb*, 18 A. B. R. 387, 153 Fed. 363 (C. C. A. N. Y.): "We do not assent to the appellant's contention that any more formal action than the overruling of objections (if any are made) and the allowance of the question is required from the referee. Upon hearing on application for discharge, the bankrupt has the opportunity to argue before the judge that the question put to him was not material, and his rights are thus as fully protected as if the referee should certify the objections to the question to the court in the first instance."

§ 2582. Withholding Discharge until Court Rules Complied with.—Even before the amendment of 1903, several cases maintained the propriety of withholding discharge until the forms and requirements of administration had been complied with.⁷⁴ And one case even denied a discharge altogether for failure of the bankrupt to surrender assets, although he had not concealed them;⁷⁵ but this case was of doubtful authority.

DIVISION 4.

FORM AND ALLEGATIONS OF THE SPECIFICATIONS.

§ 2583. Specifications of Objections to Discharge, Pleadings.—Specifications of objections to discharge are pleadings.⁷⁶

And specifications must be filed as a prerequisite to the introduction of any evidence in opposition to discharge.⁷⁷

SUBDIVISION "A."

VERIFICATION AND SIGNATURE.

§ 2584. Specifications to Be Verified.—Specifications should be verified because they are pleadings and by the bankruptcy act all pleadings must be verified.⁷⁸

⁷⁴. Ante, § 2480.

⁷⁵. In *re Fleishman*, 9 A. B. R. 557, 120 Fed. 960 (D. C. Ills.): But this was not correct law at that time.

⁷⁶. In *re Brown*, 7 A. B. R. 252, 112 Fed. 49 (C. C. A. Tex.); In *re Gift*, 12 A. B. R. 244, 130 Fed. 230 (D. C. Penn.); In *re Glass*, 9 A. B. R. 391, 119 Fed. 520 (D. C. Tenn.); In *re Wetmore*, 6 A. B. R. 703, 102 Fed. 290 (Special Master, N. Y.); In *re Baernkopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.); In *re Meuer*, 15 A. B. R. 823, 144 Fed. 445 (D. C. Pa.); impliedly,

In *re Hirsch*, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.); contra, In *re Jamieson*, 9 A. B. R. 681, 120 Fed. 697 (D. C. Ills.); impliedly, In *re Troeder*, 17 A. B. R. 729, 150 Fed. 710 (C. C. A. Mass.).

⁷⁷. In *re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.).

⁷⁸. Bankr. Act, § 18 (c). In *re Baernkopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.); In *re Brown*, 7 A. B. R. 252, 112 Fed. 49 (C. C. A. Tex.); inferentially, In *re Kretz et al.*, 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.).

In re Gift, 12 A. B. R. 244, 130 Fed. 230 (D. C. Pa.): "All pleadings setting up matters of fact are required by the Bankruptcy Act to be verified, § 18c; and objections to a discharge—according to the better opinion—being of that nature should be made under oath."

In re Glass, 9 A. B. R. 391, 119 Fed. 520 (D. C. Tenn.): "So, also, the 'specification of grounds of opposition to bankrupt's discharge' (Form 58) is either an 'answer' to the bankrupt's petition for discharge, and therefore a 'pleading,' in almost any sense, even the most technical, or else it is an independent petition, though not such in its form, asking the court to deny to the bankrupt his discharge because of the matters of fact extraneous to the record set up therein as the grounds of the opposition; and in either case, by all the analogies of any practice, and by the very terms of the statute, it surely requires verification. I cannot conceive of any kind of 'pleading' which so certainly demands a verification as this 'specification in writing.' It is to all intents and purposes, under the statute, a criminal charge, or quasi criminal at least; and, while not possessing all the elements or consequences of criminal information or indictment, it is of so grave a nature that, if any 'pleading' in any suit or practice reasonably demands verification by oath, that does most of all. Criminal informations are verified by the oath of the prosecuting officer or otherwise (10 Enc. Pl. & Prac. 451); and criminal indictments are verified by the oaths of the grand jurors. There is nothing in the bankruptcy record of so grave a nature as this, and it goes to the bifurcated root of the whole bankruptcy proceeding; for, on the one hand, the purpose is to distribute his voluntarily or involuntarily surrendered assets, and on the other, to compensate him by a discharge. The shadow of the penitentiary also falls on his side of the general suit, when such charges are made; wherefore the reason for the exaction of all verifications is on the side of requiring it to such specifications, it seems to me. It was not so much under the act of 1867, perhaps, though it must be admitted that this reasoning would have required it under that act also; and it was not demanded either by the statute or by the Supreme Court in its general orders or forms. And this may be the reason why the act of 1898 is so broad in its terms as expressed in § 18c."

And this is so notwithstanding the Supreme Court's prescribed Form No. 58 has no verification.⁷⁹

But it has also been held that they need not be verified, unless verification is required by rule of court.

In re Jamieson, 9 A. B. R. 681, 120 Fed. 697 (D. C. Ills.): "In this respect the court follows the form of objections prescribed under the act of 1867. These rules have the same weight in this case as though they were included in the express language of the statute. Such a construction of the law and of the Supreme Court rules and forms is reasonable in its practical application. The matters which may be urged by way of objections are peculiarly within the knowledge of the bankrupt. They may, and often do, come to light late in the course of the proceedings. To require the objector to make positive oath thereto would practically do away with objections to discharge. It is a matter of common experience and knowledge that the successful interposition of objections to discharge under the present act is a very difficult matter. I do not deem it in the interest of justice or right to so interpret the act as to

⁷⁹. In re Glass, 9 A. B. R. 391, 119 Fed. 520 (D. C. Tenn.); In re Gift, 12 A. B. R. 244, 130 Fed. 230 (D. C. Pa.).

enlarge its facilities in this direction by way of implication. The objections are sufficient in both form and substance.

§ 2585. But Lack of Verification May Be Waived.—But lack of verification is waived if not objected to before submission of the case or conclusion of the evidence.⁸⁰

In *re Baerncopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.) “The bankrupt took no exception to the signature, or to the lack of an affidavit, however, until after the testimony had all been taken and argument thereon before the referee had begun. This failure to except in proper time waived the defects.”

And is probably waived by merely going into the taking of the evidence on the hearing. Lack of proper jurat may not be raised as an objection for the first time on petition to review.⁸¹

§ 2586. Or Be Supplied by Amendment.—And lack of verification may be supplied by amendment.⁸²

The power of the bankruptcy court over amendments is undoubted and rests in the sound discretion of the court.⁸³

Even where one of the objecting creditors has failed to sign or verify at all, the omission may be supplied by amendment.⁸⁴

§ 2587. Where Several Objecting Creditors, All May Sign and Verify Same Specifications.—Several creditors may sign and verify the same specifications of objections to discharge.⁸⁵

§ 2588. Whether if Several Join in Same, Each Must Sign and Verify.—If there be several opposing creditors in the same specifications, it has been held that each must sign and verify.⁸⁶

§ 2589. Whether Verification by Some One with Knowledge Requisite.—It has been held that the verification should be made by some one who has sufficient knowledge of the facts to make the affidavit.⁸⁷

§ 2590. Verification by Attorneys Permitted.—Verification by attorneys in fact or attorneys at law is permitted.⁸⁸ This is so because “creditor”

^{80.} In *re Robinson*, 10 A. B. R. 477, 123 Fed. 844 (D. C. R. I.); In *re Randall*, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.).

^{81.} *Godshalk v. Sterling*, 12 A. B. R. 302, 129 Fed. 360 (C. C. A. Penn.).

^{82.} In *re Meuer*, 15 A. B. R. 823, 144 Fed. 145 (D. C. Pa.); In *re Gift*, 12 A. B. R. 244, 130 Fed. 230 (D. C. Penn.); In *re Glass*, 9 A. B. R. 391, 119 Fed. 520 (D. C. Tenn.); inferentially, *Armstrong v. Fernandez*, 19 A. B. R. 746, 208 U. S. 324; In *re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.). Compare, In *re Kretz et al.*, 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.); In *re Miller*, 27 A. B. R. 606, 192 Fed.

730 (D. C. Ia.).

^{83.} *Armstrong v. Fernandez*, 19 A. B. R. 746, 208 U. S. 324.

^{84.} In *re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.).

^{85.} *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Pa.); In *re Baerncopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.).

^{86.} In *re Glass*, 9 A. B. R. 391, 119 Fed. 520 (D. C. Tenn.); but compare, In *re Baerncopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.).

^{87.} In *re Baerncopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.).

^{88.} *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Pa.).

includes "attorney" under the definitions of the Bankruptcy Act.⁸⁹ But the reason why the creditor himself does not verify should be given.⁹⁰

§ 2591. **Forms of Verification.**—In general, it is proper for the verification to be in the form prescribed by the creditor's petition (Form No. 3), to wit: "Do hereby make solemn oath that the statements contained in the foregoing specification of grounds of opposition to the bankrupt's discharge subscribed by him (or them) are true."⁹¹ But the precise wording need not be followed.⁹²

§ 2592. **Whether Verification Must Be Positive or May Be on Information and Belief.**—It is a question whether the verification must be positively sworn to or may be on information and belief. That it must be positive, see

In re Brown, 7 A. B. R. 252, 112 Fed. 49 (C. C. A. Tex.): "A verification of such opposition seems to be required to prevent frivolous objections and waste of time, and we think that such opposition is within the intent and meaning of § 18c of the Bankrupt Act of 1898. If a verification of the opposition is required, it should be positive and certain, not vague and argumentative."

But it has also been held that verification "to the best of affiant's knowledge, information and belief," is sufficient.⁹³

§ 2593. **Specifications to Be Signed.**—The specifications must be signed;⁹⁴ but such signing may be waived.⁹⁵

SUBDIVISION "B."

ESSENTIAL ALLEGATIONS OF SPECIFICATIONS AND MANNER OF MAKING THEM.

§ 2594. **Specifications to Show Capacity of Objecting Creditor.**—The specifications should show the capacity of the objecting party, that he is a party in interest, and the facts constituting him such.⁹⁶

In re Servis, 15 A. B. R. 271, 140 Fed. 222 (D. C. Iowa): "Should also allege facts showing that the party filing the specification will be affected by

89. *Milgraum v. Ost*, 12 A. B. R. 306 (D. C. Pa.).

90. In re Baernkopf, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.); In re Glass, 9 A. B. R. 391, 119 Fed. 520 (D. C. Tenn.); In re Randall, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.).

91. In re Glass, 9 A. B. R. 391, 119 Fed. 509 (D. C. Pa.).

For form of verification by corporation, see In re Glass, 9 A. B. R. 391, 119 Fed. 520 (D. C. Tenn.).

By partnership, see In re Glass, 9 A. B. R. 391, 119 Fed. 509 (D. C. Tenn.).

By attorney, see In re Glass, 9 A.

B. R. 391, 119 Fed. 509 (D. C. Tenn.); In re Peck, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.).

92. In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

93. *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Penn.). Compare, In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

94. In re Baernkopf, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.).

95. In re Baernkopf, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.).

96. See ante, "Who May Oppose Discharge," § 2457, et seq.

the discharge (e. g., that his debt is a dischargeable debt), and is therefore interested in defeating the same."

But it has been held sufficient to allege "interested as a creditor."⁹⁷

§ 2595. All Essential Facts and Elements of Bar to Discharge, to Be Alleged.—The specifications must allege the essential facts and all the elements constituting the bar to the discharge.⁹⁸

In re Quackenbush, 4 A. B. R. 274, 102 Fed. 282 (Ref. N. Y., affirmed by D. C.): "It has been uniformly held that adequate specifications of objections to discharge must include every element which the statute prescribes as contributing to the offense condemned, and must state issuable facts."

In re Hirsch, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.): "There must be a distinct averment of the facts bringing the case within the specific denunciation of the statute and nothing else will do."

In re Kaiser, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.): "The scienter must be charged, and also all essential facts necessary to establish the commission of the offense."

In re Peacock, 4 A. B. R. 136, 101 Fed. 560 (D. C. N. Car.): "In short, the objections seem to have been made on general principles, without any regard to, or examination of, the bankruptcy law. This is not sufficient. To defeat the purposes of the act, the objections to discharge should be in strict compliance with its provisions."

In re Frice, 2 A. B. R. 676, 96 Fed. 611 (D. C. Iowa): "If counsel preparing these objections had read the Bankruptcy Statute, or only consulted the section relating to discharges, he could not have failed to note that this section points out only two grounds [before Amendment of 1903] as justifying withholding discharge, and commands the court to grant discharge unless one of these two grounds is proven. He could scarcely fail to notice, if that section be now consulted by him, that the matters attempted (as we assume) to be stated by him, are not embraced within either of these grounds."

Thus, it must be alleged that the failure to keep books of account was with intent to conceal financial condition.⁹⁹

§ 2596. "Knowingly and Fraudulently" to Be Alleged Where Act Charged Is an "Offense."—Where the act alleged is the commission of one of the offenses prohibited by the Bankrupt Act, it must be alleged to have been done "knowingly and fraudulently."¹

⁹⁷. In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

⁹⁸. In re Rhutassel, 2 A. B. R. 697, 96 Fed. 597 (D. C. Iowa); In re Blacklock, 9 A. B. R. 266 (D. C. S. C.); instance, In re Wetmore, 6 A. B. R. 704, 102 Fed. 290 (Ref. N. Y.); inferentially, In re McGurn, 4 A. B. R. 461, 102 Fed. 743 (D. C. Nev.); In re Mudd, 5 A. B. R. 242, 105 Fed. 348 (D. C. Mo.); In re Adams, 4 A. B. R. 696, 104 Fed. 72 (D. C. N. Y.); In re Pierce, 4 A. B. R. 489, 103 Fed. 64 (D. C. Wash.); In re Levey, 13 A. B. R.

312 (D. C. N. Y.); In re Gara, 26 A. B. R. 573, 190 Fed. 112 (D. C. Pa.).

⁹⁹. Compare ante, §§ 2544, 2545. Also, In re Bradin, 24 A. B. R. 793, 179 Fed. 768 (D. C. Pa.).

1. In re Wetmore, 6 A. B. R. 703, 102 Fed. 290 (Special Master N. Y.); In re Keefe, 4 A. B. R. 126; In re Quackenbush, 4 A. B. R. 281, 102 Fed. 282 (Special Master N. Y.); In re Kaiser, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.); In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.); obiter, In re Levey, 13 A. B. R. 317, 133 Fed.

In *re Patterson*, 10 A. B. R. 371, 121 Fed. 921 (D. C. N. Y.): "It will be noted that the act is explicit in defining the offenses mentioned in subd. 'b' of § 29. The acts constituting the offenses against the law must have been 'knowingly and fraudulently' done, and specification of objections that do not charge that the false oath in the bankruptcy proceedings was knowingly and fraudulently made, are not sufficient."

Thus, as to concealment of assets the acts complained of must be alleged to have been done "knowingly and fraudulently."² Thus, also, as to the perpetration of false oaths.³

But the omission of such allegation is waived by going to trial upon the merits without objection;⁴ and the defect is amendable upon seasonable application.⁵ And such allegation is not necessary at all when the act alleged is a fraudulent conveyance within the four months preceding bankruptcy, under the amendment of 1903;⁶ although of course the conveyance must be alleged to have been made fraudulently.

§ 2597. If Act Charged Is an "Offense," Must Appear to Have Been Committed after Bankruptcy, etc.—Where the ground of opposition is the commission of one of the offenses punishable by imprisonment by the Bankrupt Act, the allegations must show that the offense charged was committed after the proceedings in bankruptcy were commenced, and in the case of alleged fraudulent concealment of assets, that it was committed after the appointment of a trustee; otherwise, the allegations will not bring the case within the statute.⁷

This does not mean that all the evidentiary facts to prove the commission

572 (D. C. N. Y.); In *re Hirsch*, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.); In *re Taplin*, 14 A. B. R. 360, 135 Fed. 861 (D. C. Iowa); In *re Parish*, 10 A. B. R. 548, 122 Fed. 553 (D. C. Iowa); impliedly, In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.); In *re Mayer*, 28 A. B. R. 342, 195 Fed. 571 (D. C. N. Y.).

2. In *re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.); In *re Mudd*, 5 A. B. R. 242, 105 Fed. 348 (D. C. Mo.); In *re Frice*, 2 A. B. R. 674, 96 Fed. 611 (D. C. Iowa); In *re Hirsch*, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.); In *re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.); In *re Pierce*, 4 A. B. R. 554, 103 Fed. 64 (D. C. N. Y.); In *re Taplin*, 14 A. B. R. 360, 135 Fed. 861 (D. C. Iowa); In *re Patterson*, 10 A. B. R. 371, 121 Fed. 921 (D. C. N. Y.); In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 114, 104 Fed. 789 (D. C. Tenn.); In *re* 503 (D. C. N. Y.); In *re Parish*, 10 A. B. R. 548, 122 Fed. 553 (D. C. Iowa).

3. *Ky. Nat. Bk. of Louisville v. Carley*, 12 A. B. R. 119, 127 Fed. 686 (C. C. A. N. J.); In *re Bryant*, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.); In *re Patterson*, 19 A. B. R. 371, 121 Fed.

921 (D. C. N. Y.); In *re Taplin*, 14 A. B. R. 360, 135 Fed. 861 (D. C. Iowa); In *re Blalock*, 9 A. B. R. 266, 118 Fed. 679 (D. C. Iowa); In *re Beebe*, 8 A. B. R. 597, 116 Fed. 48 (D. C. Penn.); In *re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Penn.); inferentially, In *re Osborne*, 8 A. B. R. 165, 115 Fed. 1 (C. C. A. Mass.); In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.).

4. In *re Osborne*, 8 A. B. R. 165 (C. C. A. Mass.). Obiter, contra, In *re Taplin*, 14 A. B. R. 361 (D. C. Iowa).

5. In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.).

6. In *re Gift*, 12 A. B. R. 244, 130 Fed. 230 (D. C. Penn.).

7. In *re Patterson*, 10 A. B. R. 371, 121 Fed. 921 (D. C. N. Y.). Inferentially, obiter, In *re Steed & Curtis*, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.).

It is also a question whether misconduct of the bankrupt in a former bankruptcy is a bar. Obiter, see In *re Feigenbaum*, 9 A. B. R. 597, 121 Fed. 69 (C. C. A. N. Y.). See ante, § 2476.

of the offense must have occurred after the bankruptcy proceedings were instituted. The initial facts generally have occurred beforehand; but the concealment charged and proved must be a concealment from the trustee, and the false oath charged and proved must be a false oath in a bankruptcy proceedings.

§ 2598. **Acts Charged, to Be Brought within Time Limit.**—The acts charged must be brought within the time limit, if there be a time limited therefor.⁸

§ 2599. **Distinct Grounds May Be Joined in One Specification.**—Several distant grounds of opposition may be alleged in one specification.

§ 2600. **But Each Ground to Be Separately Stated.**—But each ground of opposition must be separately stated.¹⁰

§ 2601. **All Grounds Need Not Be Sustained.**—And all the grounds need not be sustained. The discharge will be refused if any one is sustained.¹¹

Hudson v. Mercantile Nat'l Bk., 9 A. B. R. 432, 119 Fed. 346 (C. C. A. Colo.): "If any one of the numerous specifications in opposition to the bankrupt's discharge is well pleaded and is sustained by the evidence, it follows, of course, that the order refusing a discharge must be affirmed, since it is not required of any one who objects to a bankrupt's discharge that he shall maintain all of his specifications in opposition thereto."

§ 2602. **Specifications Not to Be Used as "Dragnet" or "Fishing Expedition."**—Specifications should not be used as a "dragnet" nor as a cover for a "fishing expedition;" for abundant opportunity is afforded for discovery by the "general examination" of the bankrupt and witnesses; and no good reason seems to exist for not producing evidence directly to the point.¹²

In re Hirsch, 2 A. B. R. 720, 96 Fed. 468 (D. C. Tenn.): "The law affords ample opportunity, by examination of the bankrupt and otherwise, to enable the creditors to disclose the actual facts; and, while it will not be required that the evidence shall be put in the pleadings, it should be required, in all justice, and in accordance with the ordinary rules of penal or criminal as well as of civil procedure of that kind which charges fraud, that the facts must be stated, and not mere epithetical conclusions of fact, as is too common in pleadings of this character."

In re Hixon, 1 A. B. R. 613, 93 Fed. 440 (D. C. Iowa): "Abundant opportunity is given for the examination, under oath, of the bankrupt at the first meeting of creditors, and afterwards at the time by the referee fixed for filing written appearance of creditors (paragraph 1 of Rule XII), thus enabling the creditor to secure the opportunity of a second examination of the bankrupt in the light

8. *In re Steed & Curtis*, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.).

10. *In re Wetmore*, 6 A. B. R. 703, 102 Fed. 290 (Special Master N. Y.).

11. *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa).

12. *In re Mudd*, 5 A. B. R. 242, 105 Fed. 348 (D. C. Mo.); *In re Peck*, 9 A. B. R. 947, 120 Fed. 972 (D. C. Conn.).

of such facts as the creditor may have learned after said first meeting. No doubt, upon a proper showing, the referee would provide opportunity for examination of the bankrupt between these two meetings. Thus the creditor has at his command abundant opportunity to ascertain particular and specific facts on which to base whatever opposition he desires to make to the discharge of the bankrupt. If, on such examination, the sworn testimony of the bankrupt discloses facts whose existence would prevent such discharge, the creditor is afforded ready opportunity to specify and present same. If, however, such sworn testimony is claimed to be materially false and the creditor can prove the truth then such creditor can readily specify the particulars wherein such false oath is alleged so that court and bankrupt may easily comprehend same. The same general suggestions are correct as to the other grounds whose proven existence would defeat discharge. But it is incumbent on the creditor to assert and prove the existence of facts sufficient, under the statute, to defeat discharge. On the creditor is the burden of proof."

§ 2603. Must Not Be Indefinite nor General nor Argumentative, but Certain and Positive.—The specifications must not be indefinite nor general, but certain, positive and specific.¹³

In re Troeder, 17 A. B. R. 729, 150 Fed. 710 (C. C. A. Mass.): " * * the practice with reference thereto is settled in accordance with the fundamental principles of pleading, although not according to strict rules, and to the effect that the allegations must be specific and of such a character that their sufficiency may be met by demurrer, or by exceptions analogous to those allowed in equity."

In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.): "The rule is, the facts relied on to prevent a discharge must be pleaded with sufficient certainty of detail as to apprise the bankrupt of the charge he has to meet and to enable the court to understand the issue to be examined and determined by it"

In re McGurn, 4 A. B. R. 459, 102 Fed. 743 (D. C. Nev.): "Specifications in opposition to a bankrupt's application for a discharge, and the proofs in support thereof, should be clear, positive, and direct. The opposing creditor or creditors must distinctly allege and prove one (or more) of the statutory grounds for refusing a discharge."

In re Servis, 15 A. B. R. 271, 140 Fed. 222 (D. C. Iowa): "The specification should distinctly allege the particular grounds relied upon to defeat the discharge, so as to advise (1) the bankrupt of the grounds relied upon, in order that he may prepare to meet the same, and (2) the court of the issue to be tried."

In re Hirsch, 2 A. B. R. 715, 97 Fed. 571 (D. C. Tenn.): "They do not yet set out how the property has been concealed from the creditors or trustees, nor how the books have been concealed or destroyed, unless it may be said that the

13. In re Peacock, 4 A. B. R. 136, 101 Fed. 560 (D. C. N. C.); In re Blacklock, 9 A. B. R. 266, 118 Fed. 679 (D. C. S. C.); In re Wolfensohn, 5 A. B. R. 60 (Special Master N. Y.); In re Mudd, 5 A. B. R. 242, 105 Fed. 348 (D. C. Mo.); In re Steed & Curtis, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. C.); In re Holman, 1 A. B. R. 604, 92 Fed. 512 (D. C. Iowa); In re McNamara, 2 A. B. R. 578 (Special Master N. Y.); In re Peck, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.); In re Wetmore, 6

A. B. R. 703, 102 Fed. 290 (Special Master N. Y.); In re Frice, 2 A. B. R. 675, 96 Fed. 611 (D. C. Iowa). To same effect, analogously, In re White, 14 A. B. R. 241 (D. C. Penn.). In re Randall, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.); In re McCarthy, 22 A. B. R. 499, 170 Fed. 859 (D. C. N. Y.), quoted at § 2610; impliedly, In re Wittenberg, 20 A. B. R. 398, 160 Fed. 991 (D. C. Pa.); In re Main, 30 A. B. R. 547, 205 Fed. 421 (D. C. Iowa).

pleading goes upon the ground that the mere fact that the property was not put upon the schedules is, of itself, conclusive evidence of such concealment as is denounced by the statute, both criminally, and as a ground for withholding the discharge, and that the mere nonproduction of the books on demand is conclusive of their destruction or concealment. It is well enough to notify attorneys that, where objection is made, the court will insist that the specifications in opposition to a discharge shall notify the bankrupt of the conduct on his part which is relied upon for denying the discharge to him, and mere general charges or 'fishing' specifications will not suffice. The law affords ample opportunity, by examination of the bankrupt and otherwise, to enable the creditors to disclose the actual facts; and, while it will not be required that the evidence shall be put in the pleadings, it should be required, in all justice, and in accordance with the ordinary rules of penal or criminal as well as of civil procedure of that kind which charges fraud, that the facts must be stated, and not mere epithetical conclusions of fact, as is too common in pleadings of this character. A sufficient pleading by averring the facts would disclose the character of the transaction, without any use at all of the denunciatory words, and yet be completely within the impeachment of the statute. To say that a bankrupt has knowingly and fraudulently concealed a thing is only to accuse by calling names, and is not pleading a fact. On the face of these specifications nothing appears. It is said that the bankrupt is the sole owner of a certain stock of goods described in the specifications. But how has he concealed it? The specification does not inform us. We can see from the proof what the creditors probably mean, but the pleading should require no such aid from the proof. The evidence should support the averments of the plea by proving them, but it cannot supply the necessary averments of a pleading."

In *re Hixon*, 1 A. B. R. 613, 93 Fed. 440 (D. C. Iowa): "Indeed these charges cannot, in any proper sense, be termed 'specification' but are plainly and grossly generalization."

In *re Parish*, 10 A. B. R. 548, 122 Fed. 553 (D. C. Iowa): "Furthermore, the facts relied on must be stated with reasonable particularity. In this case the realty claimed to belong to the bankrupt, but by him concealed from his trustee, should be described, together, with the names of the persons holding the title, the time of the transfer, and any other facts necessary to identify the transaction."

In *re Ginsburg*, 12 A. B. R. 461, 130 Fed. 627 (D. C. Pa.): "We find that the second, third and fourth specifications or objections must be dismissed for the reason that they are fatally defective in failing to specify what property was transferred, removed, destroyed, and concealed, or wherein the said Ginsburgh made a false oath as to the amount of his assets while under examination before the referee."

Obiter, In *re Rauchenplat*, 9 A. B. R. 763, 1 P. R. 471 (D. C. Porto Rico): "Specifications must be clear and definite, not vague and general."

Thus, as to a charge of false oath, the referring to the stenographer's notes for the details of the false swearing is insufficient;¹⁴ also the failure to specify wherein the amount of his assets was falsely sworn to on general examination.¹⁵ Thus, as to a charge of obtaining property on credit on a false statement in writing, not only must the false representations be set

14. In *re Goodale*, 6 A. B. R. 493, 109 Fed. 783 (D. C. N. Y.).

15. In *re Ginsburg*, 12 A. B. R. 461, 130 Fed. 627 (D. C. Pa.).

out, but the name of the person defrauded must be given.¹⁶

Likewise, as to a charge of fraudulent concealment of property, the property itself must be described in such manner that it may be identified; ¹⁷ and the ultimate acts of concealment must be pleaded.¹⁸

In *re Hirsch*, 2 A. B. R. 715, 97 Fed. 571 (D. C. Tenn.): "But how has he concealed it? The specification does not inform us. We can see from the proof what the creditors probably mean, but the pleading should require no such aid from the proof. The evidence should support the averments of the plea by proving them, but it cannot supply the necessary averments of a pleading."

Likewise, as to books of account, if the charge is of concealment or destruction, the books must be described.¹⁹

§ 2604. No Greater Definiteness Necessary than Nature of Facts Requires.—But no greater definiteness is necessary than the nature of the case or of the facts requires.²⁰

§ 2605. Whether to Be Pleaded "with Certainty of Indictment" Where "Offense" Charged.—However, some courts have held that where the ground of opposition is the commission of one of the offenses punishable by imprisonment, the allegations must be substantially as certain as in a criminal indictment.²¹

In *re Hirsch*, 2 A. B. R. 717, 96 Fed. 468 (D. C. Tenn.): "Substantially, the pleading must be as specific as a criminal information or indictment."

§ 2606. Evidence Not to Be Pleaded.—Evidence should not be pleaded.²²

In *re Nathanson*, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.): " * * * The decision of Judge Coxe in the Matter of Godale, 6 A. B. R. 493, 109 Fed. 783, that 'the facts relied on to prove falsity' should be stated, does not mean that evidence must be set forth."

Obiter, In *re Troeder*, 17 A. B. R. 729, 150 Fed. 710 (C. C. A. Mass.): "We

16. In *re Levey*, 13 A. B. R. 312, 133 Fed. 572 (D. C. N. Y.).

17. Instance held too indefinite, In *re Mudd*, 5 A. B. R. 242, 105 Fed. 348 (D. C. Mo.); instance held too indefinite, In *re Ginsburg*, 12 A. B. R. 461, 130 Fed. 627 (D. C. Pa.).

18. In *re Frice*, 2 A. B. R. 675, 96 Fed. 611 (D. C. Iowa).

19. Instance held sufficiently definite, *Godshalk v. Sterling*, 12 A. B. R. 302, 129 Fed. 580 (C. C. A. Penn.): In this case the property and act were described to be "voucher, to wit: canceled checks and check stubs, through the agency of the regularly authorized bookkeeper."

Instance held indefinite, *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Penn.).

20. *Bragassa v. St. Louis Cycle Co.*,

5 A. B. R. 700, 107 Fed. 77 (C. C. A. Tex.); instance, *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Penn.).

21. In *re Taplin*, 14 A. B. R. 361, 135 Fed. 861 (D. C. Iowa); In *re Levey*, 13 A. B. R. 312, 133 Fed. 572 (D. C. N. Y.); In *re Quackenbush*, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.).

Obiter (almost with the exactness of an indictment), In *re Wetmore*, 6 A. B. R. 703, 102 Fed. 290 (Spec. Master N. Y.).

Contra, In *re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.): But "not necessarily with the technical certainty required of an indictment."

22. Instance where pleaded and held to be improper, In *re Frice*, 2 A. B. R. 675, 96 Fed. 611 (D. C. Iowa). Also compare ante, § 1767.

find incorporated in the specifications what amounts to 15 printed pages of extracts from the bankrupt's examination, including what appears there as so-called direct-examination and what appears there as so-called cross-examination, in the precise form in which it was taken down by the referee. There are no allegations setting out specifically any false oath, or explaining its materiality and relevancy, according to any rules of pleading in proceedings at law. Thus this portion of the specifications is clearly insufficient."

Thus, it would not be proper to plead the evidence proving the fraudulent intent in concealment, so long as the property and the acts constituting the concealment are described.

But, of course, if the ultimate facts are sufficiently pleaded, it will not detract from the validity of the specifications that evidential facts also are added.²³

§ 2607. Legal Conclusions Not to Be Plead.—Legal conclusions are not to be pleaded.²⁴

§ 2608. Thus, Allegations in Mere Words of Statute Sufficient Only Where Failure to Keep Books, Ground Charged—Elsewhere Insufficient.—Allegations in the mere words of the statute are, in one instance, to wit, failure to keep any books of account or records whatsoever, sufficient.²⁵

Godshalk v. Sterling, 12 A. B. R. 302, 129 Fed. 580 (C. C. A. Penn.): " * * the objecting creditor need not specify what books of account the bankrupt should have kept."

In re Ginsburg, 12 A. B. R. 459, 130 Fed. 627 (D. C. Penn.): "This is charged in the language of the Act, and states all that is required in setting it forth. No further particulars could be given."

In re Patterson, 10 A. B. R. 371, 121 Fed. 921 (D. C. N. Y.): "As to the fourth specification of objection the same is, as clearly, sufficient. In the language of the Act it charges a failure to keep books of account, etc. It alleges a fact. No further particulars could be given."

But where the failure charged is not an absolute failure to keep any books or records whatsoever, but is a failure to keep such as would enable the financial condition to be ascertained, the particulars in which the failure consists should be set out.²⁶

Obiter, *In re Lewis*, 20 A. B. R. 711, 163 Fed. 137 (D. C. N. Y.): "Objection to discharge is made upon two grounds: First, that the bankrupt is engaged in

²³. *In re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

²⁴. Compare, similarly, §§ 252, 1767. *In re Main*, 30 A. B. R. 547, 205 Fed. 421 (D. C. Iowa).

²⁵. *In re Levey*, 13 A. B. R. 312, 133 Fed. 572 (D. C. N. Y.). *Obiter*, *In re Peck*, 9 A. B. R. 750, 120 Fed. 972 (Ref. Conn.). *In re Nathanson*, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.); *In*

re Magen Bros. Co., 27 A. B. R. 729, 192 Fed. 883 (C. C. A. Pa.). Apparently, contra, *In re McNamara*, 2 A. B. R. 576 (Special Master N. Y.).

²⁶. *In re Hixon*, 1 A. B. R. 610, 33 Fed. 440 (D. C. Iowa); *In re Quackenbush*, 4 A. B. R. 281, 102 Fed. 282 (Ref. N. Y.); [1867] *In re Littlefield*, 3 N. B. Reg. 57; [1867] *In re Bellis*, 3 N. B. Reg. 496.

business and rents a home, but has failed to keep books of account or records from which his true condition might be ascertained, 'with intent to conceal his true financial condition and in contemplation of bankruptcy.' This form of objection follows the language of the statute, and may be criticised, in that it is impossible to tell whether an utter failure to keep books is intended to be charged, or whether the books that were kept are insufficient to show the true condition of the bankrupt's property. Under ordinary circumstances the objecting creditor should make his objections more specific; but, as the record in the case shows the bankrupt to have testified that he kept no books of account, further amendment is unnecessary, and the objection will be held sufficient to be referred."

In *re Peck*, 9 A. B. R. 750, 120 Fed. 972 (Ref. Conn., affirmed by D. J.): "With regard to the allegation of failure to keep books, it has been held in one or two cases that the general words of the statute describing the offense are sufficient for the introduction of evidence where the intent is to allege that the bankrupt kept no books at all. In the present case, however, the attorney for the objecting creditors examined the bankrupt, and the bankrupt's books, consisting of ledgers, cash book, day book, etc., at great length, occupying two days therein, and if there existed any facts sufficient to constitute a bar to the discharge in relation to the books, or to the business dealings and testimony of the bankrupt, the objecting creditors were in a position to specifically charge such acts."

In *re Nathanson*, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.): "The specifications are too indefinite, unless the creditor intends to charge that there were no books, and if so, that should be alleged as the truth and facts of the situation. As to specification 4, likewise, the creditor should specify that the bankrupt did keep a ledger, if that is the issue to be raised. Specification 5, the creditor should likewise state that the bankrupt did keep a book of expense, if that is the fact upon which the charge of falsity is based. Specification 6, the specification should state that the bankrupt kept not even one book, if that is the particular in which the testimony is alleged to be untrue."

[1867] In *re Frey*, 9 Fed. 376: "The objection being, therefore, to the manner in which the books are kept, and to imperfections, or omissions therein, general objections, like those above stated, are not sufficient. The particular irregularities or omissions must be pointed out in the specifications, to entitle them to be considered."

[1867] In *re Graves*, 24 Fed. 550: "The authorities appear to be numerous and uniform that, under a broad, indefinite allegation like the present, the creditor may prove that the bankrupt kept no books at all, or that he failed to keep any one of the books, necessary for the transaction of the business in question. Having failed in this, however, he cannot enter into an examination of the books themselves, for the purpose of showing that they were carelessly kept, or kept on a wrong principle. If such an issue is to be raised, the bankrupt must be advised of it by distinct, specific, and definite statements of pleading."

And where the allegation of total failure is intermingled with allegations as to "destruction" and "concealment" of books of account, etc., the words of the statute will be insufficient.²⁷

Allegations in the mere words of the statute (in all instances of bars to

²⁷ *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Penn.); In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D.

C. Iowa); In *re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.).

discharge except as to the absolute failure to keep any books of account or records whatsoever) are, in short, insufficient.²⁸

United States v. Carl, 105 U. S. 611: "It is not sufficient to set forth the offense in the words of the statute, unless those words, of themselves, fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

In *re Hirsch*, 2 A. B. R. 715, 97 Fed. 571 (D. C. Tenn.): "But they likewise fall under the general rule that where the language of a statute does not of itself serve the purpose of giving notice to the offender of the particular conduct which is charged against him as an offense, the pleader must aver the facts with sufficient fullness to accomplish that object."

In *re Hixon*, 1 A. B. R. 613, 93 Fed. 440 (D. C. Iowa): "And since abundant opportunity is thus afforded the creditor for particularly and definitely ascertaining the exact grounds upon which a discharge should be refused, if such grounds exist, no injustice is done to the creditor by requiring that for which the statute, general orders, and rules provide, viz, 'specification' of such grounds. This is due to the bankrupt, that he may prepare to meet such grounds. It is due, also, to the court, that the court may have a defined limit within which evidence and argument may be confined. The statute (§ 14) states in most general terms the 'grounds' for refusing discharge. Plainly, this was necessary, since, with the general boundaries so clearly stated, we could the more accurately and readily determine whether a specific state of facts was included therein. Equally manifest is it that a part of the duty of an opposing creditor is to so clearly and specifically state the facts constituting the grounds of his opposition that the court may know whether such grounds are within the terms of the statute."

Obiter In *re Wetmore*, 6 A. B. R. 704, 99 Fed. 703 (Special Master N. Y.): "It is not enough to plead in the language of the statute, 'where the language of the statute does not of itself serve the purpose of giving notice to the offender of the particular conduct which is charged against him as an offense.'"

[1867] In *re Condict*, 19 B. Reg. 142, Fed. Cas. 3,094: "It has been the uniform practice under the Bankrupt Act to consider all specifications too vague and general which charge the offense in the words of the act. The particulars in which the bankrupt has offended should be so set forth that he may be apprised of the precise matters wherein he is alleged to have transgressed."

Thus, alleging concealment of assets in the words of the statute, is insufficient.²⁹

In *re Ginsburg*, 12 A. B. R. 459, 130 Fed. 627 (D. C. Penn.): "* * * are fatally defective unless the facts are fully stated."

Likewise, alleging in the words of the statute the commission of a false

28. Obiter, *McNeil v. U. S.*, 18 A. B. R. 21 (C. C. A. Tex.); In *re McNamara*, 2 A. B. R. 576 (Special Master N. Y.); In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa): impliedly. In *re Bromley*, 18 A. B. R. 227, 152 Fed. 493 (D. C. Pa.); [1867] In *re Butterfield*, 5 Biss. 120; [1867] In *re Hill*, 2 Ben. 136, Fed. Cases No. 6,482; [1867] In *re Freeman*, 4 Ben. 245, Fed.

Cases No. 5,082; In *re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.). Obiter, In *re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

29. In *re Quackenbush*, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.); *Godshalk v. Sterling*, 12 A. B. R. 302, 129 Fed. 580 (C. C. A. Penn.); In *re McNamara*, 2 A. B. R. 576 (Special Master N. Y.).

oath, is insufficient;³⁰ also the destruction or concealment of books of account, etc.³¹

Likewise, alleging in the words of the statute the obtaining of property on credit on a materially false statement in writing is insufficient.³²

Godshalk v. Sterling, 12 A. B. R. 302, 129 Fed. 580 (C. C. A. Penna.): "The specification numbered 2 does not set forth what the 'materially false statement' was upon which the bankrupts obtained credit. No good reason appears why at least the substance of this alleged false statement was not contained in the specification."

And allegations in the mere words of the statute have been held, in one case, insufficient even to base an amendment upon.³⁴

§ 2609. Alternative Allegations Improper.—Allegations in the alternative are usually improper.³⁵

SUBDIVISION "C."

DEFECTIVE SPECIFICATIONS: TAKING ADVANTAGE OF THEM: WAIVING AND AMENDING THEM: FATAL VARIANCES.

§ 2610. Defective Specifications; Rights and Remedies.—The bankrupt, as may be appropriate, may move to require defective specifications to be made more definite and certain; may move to strike out improper or superfluous allegations; may object to the introduction of any evidence, if specifications are fatally defective; and may demur.

It has been held that the bankrupt need not demur in order to avail himself of the insufficiency of allegations; and that he may avail himself of the insufficiency at the hearing.

In *re Crist*, 9 A. B. R. 1, 116 Fed. 1007 (D. C. Ala.): "Where the allegations of the specifications are vague and general, or unauthorized by law, the bankrupt may move to have them stricken out, or he may rely upon his defense at the time of the hearing; for the court will disregard such allegations. In *re Wagoner*, Fed. Cas. No. 17,037; In *re Rathbone*, Fed. Cas. No. 11,580; In *re Tyrrel*, Fed. Cas. No. 14,314. If the allegations are insufficient in law, the bankrupt may file exceptions to them, analogous to those allowed in equity, or he may demur, or may neither except nor demur, but leave it to the court to hear the application for a discharge, and such pleas and proofs as may be made in opposition thereto by parties in interest."

30. In *re Ginsburg*, 12 A. B. R. 459, 130 Fed. 627 (D. C. Penn.); In *re McNamara*, 2 A. B. R. 576 (Special Master N. Y.).

31. In *re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.); In *re Hirsch*, 2 A. B. R. 717, 96 Fed. 468 (D. C. Tenn.); *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Penn.); In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

32. In *re Levey*, 13 A. B. R. 317, 133 Fed. 572 (D. C. N. Y.).

34. In *re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.). Compare post, § 2614.

35. In *re Quackenbush*, 4 A. B. R. 274, 120 Fed. 282 (D. C. N. Y.); apparently, In *re Holman*, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

Apparently, *Milgraum v. Ost*, 12 A. B. R. 306, 129 Fed. 827 (D. C. Penn.), although perhaps this decision was based on the following of the bare statutory words rather than because of being in alternative.

Undoubtedly he may thus avail himself by objection to the introduction of evidence where the allegations are so obscure and indefinite as to be mere nullities.

In *re McCarthy*, 22 A. B. R. 499, 170 Fed. 859 (D. C. N. Y.): "There is no express rule in this district by which defects in the form of specifications are waived by the bankrupt's failure to except or demur to them. Still, it is proper in most instances that the special master should disregard all defects in form to which the bankrupt has not excepted. If the specifications in the case at bar had stated anything which, by any construction whatever, would have come within the statute, I should have held that a failure to except, waived any failure of form; but after reading them with a great deal of care, and construing them in the most benign sense possible, I cannot really understand which of the statutory grounds, if any, the creditor means to assert. * * * Therefore there was nothing before the learned referee, and the specifications were, in fact, a mere nullity. I suppose there must be a degree of meaningless verbiage which the bankrupt can afford to disregard altogether, and I do not think that by failing to except he must be ready before the referee to rebut any proof which the creditor may be then ready to adduce under the statute. The specifications in this case seem to me to be meaningless verbiage, and I think they have no weight in any stage of the proceedings."

Yet, where the defect does not consist of a total failure to state some element of the act attempted to be alleged but consists only of stating it with not sufficient definiteness, it would seem to be the better rule as stated in a subsequent section that such defect should be urged before the hearing, and that it is waived by going to hearing thereon without objection.³⁶

§ 2611. Whether Specification of One Ground and Proof of Another, a Fatal Variance.—Where one ground is specified but another is proved, it has been held to be a fatal variance,³⁷ unless, of course, permission be given to amend the specification to conform with the proof. But it is doubtful whether the power of amendment may be stretched thus far.³⁸

§ 2612. Defective Specifications Waived by Going to Trial without Objection.—Defective specifications are waived by going to trial on the merits without objection.³⁹

In *re Osborne*, 8 A. B. R. 165, 115 Fed. 1 (C. C. A. Mass.): "Where the

³⁶. Inferentially, In *re Baldwin*, 9 A. B. R. 591, 119 Fed. 796 (D. C. N. Y.).

Where by local rule it is necessary to raise objections to the sufficiency of the allegations within a specified time by motion before the judge and the parties proceed to trial without making such objections, all objections to the sufficiency are waived, and after trial objections that the evidence received was not within the issue, comes too late. In *re Baldwin*, 9 A. B. R. 591, 119 Fed. 796 (D. C. N. Y.); obiter, inferentially, In *re Knaszak*, 18 A. B.

R. 188, 151 Fed. 503 (D. C. N. Y.); inferentially, In *re McCarthy*, 22 A. B. R. 499, 170 Fed. 859 (D. C. N. Y.), quoted supra; In *re Daugherty*, 26 A. B. R. 550, 189 Fed. 239 (D. C. Ky.).

³⁷. In *re Halsell*, 13 A. B. R. 106, 132 Fed. 562 (D. C. Tex.).

³⁸. See post, § 2617.

³⁹. *Osborne v. Perkins*, 7 A. B. R. 250, 112 Fed. 127 (C. C. A. Mass.); *Bragassa v. St. Louis Cycle Co.*, 5 A. B. R. 700, 107 Fed. 77 (C. C. A. Tex.). But see In *re Crist*, 9 A. B. R. 1, 116 Fed. 1007 (D. C. Ala.).

specifications failed utterly to allege that the concealment complained of was done fraudulently and knowingly."

In *re Baldwin*, 9 A. B. R. 591, 119 Fed. 796 (D. C. N. Y.): "If the contention of the opposing creditor is correct, and established by satisfactory evidence, the petitioner is not entitled to his discharge. The objections and specification of the opposing creditor are quite informal and somewhat defective. But no demurrer, or motion in the nature of a demurrer, was interposed, and the parties proceeded to a hearing and went through the trial without raising the question of their sufficiency. It was then too late to raise that question. The bankrupt, by pursuing this course, waived all objection to their sufficiency."

Thus, lack of verification of specifications is waivable.⁴⁰

But where there is not a mere omission to allege the objecting party to be a party in interest, but an affirmative allegation showing him to be *not* a party in interest, the defect is not waived by failure to object.

In *re Servis*, 15 A. B. R. 271, 140 Fed. 222 (D. C. Iowa): "The failure to allege in the specification to whom the bankrupt was indebted for borrowed money or for goods not due or past due, and to verify the same, are perhaps waived by the failure to except to the specifications upon these grounds; but where the specification fails to show that the party making the same is a party in interest and will be affected by the discharge, but affirmatively shows that he will not be, the court itself may take notice of this, though the specification is not excepted to, for opposition to a discharge will not be heard or determined at the instance of one who does not show in his specification that he is a party in interest, and therefore entitled to oppose the same. This specification is fatally defective in this respect, and presents no issue that should be considered or determined. See *In re Brown*, 7 Am. B. R. 252, 112 Fed. 49; *In re Chandler* (C. C. A.), 14 Am. B. R. 512, 138 Fed. 637."

If defective specifications are not waived, it is the master's duty to report back to the court that nothing has been filed with him in the way of objections which he considers to require the taking of evidence.⁴¹

§ 2613. Defective Specifications May Be Amended.—Defective specifications may be amended, in the discretion of the court.⁴²

In *re Hendrick*, 14 A. B. R. 795, 138 Fed. 473 (D. C. Conn.): "The creditors have offered to file amendments which go to matters of form. I think that

40. In *re Robinson*, 10 A. B. R. 477, 123 Fed. 844 (D. C. R. I.); *Godshalk v. Sterling*, 12 A. B. R. 302, 129 Fed. 580 (C. C. A. Pa.); *obiter*, In *re Servis*, 15 A. B. R. 274, 140 Fed. 222 (D. C. Iowa).

41. In *re Hendrick*, 14 A. B. R. 795, 138 Fed. 473 (D. C. Conn.).

42. In *re Osborne*, 8 A. B. R. 165, 115 Fed. 1 (C. C. A. Mass.); In *re Hixon*, 1 A. B. R. 610, 93 Fed. 440 (D. C. Iowa); In *re Glass*, 9 A. B. R. 391, 119 Fed. 509 (D. C. Tenn.); In *re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.); In *re Carley*, 8 A. B. R. 720, 117 Fed. 130 (C. C. A. N. J.); In *re Nathanson*, 18 A. B. R. 252, 152 Fed. 585 (D. C. N. Y.); In *re Bemis*, 5 A. B.

R. 36, 104 Fed. 672 (D. C. N. Y.); In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503; In *re Morgan*, 4 A. B. R. 402, 101 Fed. 982 (D. C. Ark.). Impliedly, In *re Pierce*, 4 A. B. R. 554, 103 Fed. 64 (D. C. N. Y.); impliedly, In *re Nathanson*, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.); instance, In *re Wittenberg*, 20 A. B. R. 398, 160 Fed. 991 (D. C. Pa.); instance, In *re McCann Bros.*, 22 A. B. R. 557, 171 Fed. 266 (D. C. Pa.); In *re Kretz et al.*, 32 A. B. R. 365, 212 Fed. 784 (D. C. Wash.); In *re Weston*, 30 A. B. R. 647, 206 Fed. 281 (C. C. A. N. Y.); In *re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.); In *re Bradin*, 24 A. B. R. 793, 179 Fed. 768 (D. C. Pa.).

they are entitled to do this, if by so doing they shall not change the substantial nature of their objections."

Thus, where the amendment consists simply of an amplification of the allegations of a fraudulent transfer, it has been permitted.⁴³ And amendment should be allowed, as of course, where no laches on the part of the creditor appears, and no injustice to the bankrupt or unreasonable delay will result.⁴⁴

§ 2614. Must Be Something in Pleading Whereby to Amend.—There must be something already in the pleading by which to amend.⁴⁵ And allegations in the mere words of the statute have been held insufficient to base an amendment upon.⁴⁶

§ 2615. Amendment Permissible after Time Limited for Filing Specifications.—Amendment may be permitted even after the expiration of the time allowed by law for filing specifications.⁴⁷ But after the time within which the objections to the bankrupt's discharge are required to be filed, an amendment thereto in matter of substance is only allowable where there is already a record sufficient to justify it.⁴⁸

§ 2616. Even New Ground of Opposition May Be Added.—Amendment may be had even to introduce new grounds of opposition;⁴⁹ but not to introduce an entirely new ground of opposition after the evidence is all in, and especially not on review.⁵⁰

§ 2617. Amendment to Conform Pleadings to Proof, but Not to Set Up Entirely New Ground after Trial.—After hearing had, amendment may be allowed in order to conform the pleadings to the proof;⁵¹ but not, after hearing is concluded, to introduce an entirely new ground of opposition.⁵²

⁴³. In re Gift, 12 A. B. R. 244, 130 Fed. 230 (D. C. Pa.).

⁴⁴. In re Carley, 8 A. B. R. 720, 117 Fed. 130 (C. C. A. N. J.).

⁴⁵. In re Peck, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.); In re Mercur, 8 A. B. R. 275, 116 Fed. 655 (D. C. Pa.); In re Bromley, 18 A. B. R. 227, 152 Fed. 493 (D. C. Pa.).

In re Gift, 12 A. B. R. 244, 130 Fed. 230 (D. C. Penn.): In this decision the qualification is added "after the time for filing objections to the discharge has expired;" but of course all amendments must have something whereby to amend already in the record; and absolutely new specifications could be filed, regardless of the condition of the record, up to the time limited for filing them.

⁴⁶. In re Peck, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.). Compare ante, § 2608.

⁴⁷. In re Morgan, 4 A. B. R. 402, 101

Fed. 982 (D. C. Ark.); In re Osborne, 8 A. B. R. 165, 115 Fed. 1 (C. C. A. Mass.); In re Nathanson, 18 A. B. R. 252, 152 Fed. 585 (D. C. N. Y.).

⁴⁸. In re Gift, 12 A. B. R. 244, 130 Fed. 230 (D. C. Penn.); In re Johnson, 27 A. B. R. 644, 192 Fed. 356 (D. C. S. D.).

⁴⁹. In re Glass, 9 A. B. R. 391, 119 Fed. 509 (D. C. Tenn.); Contra, but obiter, In re Hendrick, 14 A. B. R. 795, 138 Fed. 473 (D. C. Conn.).

⁵⁰. See next paragraph following. In re Johnson, 27 A. B. R. 644, 192 Fed. 356 (D. C. S. D.).

⁵¹. In re Pierce, 4 A. B. R. 554, 103 Fed. 264 (D. C. N. Y.); In re Lesser, 5 A. B. R. 330, 108 Fed. 205 (D. C. N. Y.). Obiter, In re Knaszak, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.); In re Mintzer, 28 A. B. R. 743, 197 Fed. 647 (D. C. N. Y.).

⁵². In re Pierce, 4 A. B. R. 554, 103 Fed. 264 (D. C. N. Y.).

§ 2618. Amendment May Be Ordered.—Amendment may be ordered.⁵³

§ 2619. Striking Off Specifications after Amendment for Failing Still to Show Sufficient Grounds.—If, after amendment, the specifications still fail to show sufficient grounds, they may be stricken off.⁵⁴

§ 2620. Amendment May Be Conditioned on Payment of Costs. Amendment may be conditioned on payment of costs.⁵⁵

§ 2621. Amendment May Be Refused.—Amendment may be refused for proper cause. Thus, amendment of specifications may be refused on account of laches; ⁵⁶ or on account of lack of proper excuse; ⁵⁷ or on account of evident nonexistence of essential facts; ⁵⁸ or on account of there being “nothing to amend by,” the pleading being merely in the words of the statute.⁵⁹

In re Bromley, 18 A. B. R. 227, 152 Fed. 493 (D. C. Pa.): “There is no statement of fact on which an amendment can be grafted, and leave to amend should not be granted where only the words of the statute are used.”

Or where the amendment tendered fails to state good ground of opposition.⁶⁰

§ 2622. Refusal to Permit Amendment Reviewable for Abuse of Discretion.—Refusal to permit amendment in a proper case may be an abuse of discretion reviewable by the circuit court of appeals, for it is a substantial right of the creditor.⁶¹

SUBDIVISION “D.”

ANSWERING THE SPECIFICATIONS.

§ 2623. Answer to Specifications Not Necessary.—The specifications need not be met by answer: they are taken as denied.⁶²

In re Logan, 4 A. B. R. 525, 120 Fed. 876 (D. C. Ky.): “It is insisted by the creditor, inasmuch as the bankrupt made no response to the specifications of objections to the discharge, that the charges made by the creditor therein should be taken as confessed; and we are cited to Loveland, Bankr., § 281, in support

⁵³. In re Holman, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa); In re Bradin, 24 A. B. R. 793, 179 Fed. 768 (D. C. Pa.).

⁵⁴. In re Holman, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa).

⁵⁵. Instance, In re Patterson, 10 A. B. R. 371, 374, 121 Fed. 921 (D. C. N. Y.).

⁵⁶. Kentucky Nat'l Bk. v. Carley, 10 A. B. R. 375, 121 Fed. 822 (C. C. A. N. J.); In re Mudd, 5 A. B. R. 242, 105 Fed. 348 (D. C. Mo.). Obiter, inferentially, In re Nathanson, 18 A. B. R. 252, 254, 152 Fed. 585 (D. C. N. Y.).

⁵⁷. In re Hixon, 1 A. B. R. 610, 93 Fed. 440 (D. C. Iowa).

⁵⁸. In re Hixon, 1 A. B. R. 610, 93 Fed. 440 (D. C. Iowa).

⁵⁹. In re Peck, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.).

⁶⁰. Compare, analogously (petition for recovery of preferences.) Johnson v. Anderson, 11 A. B. R. 294, — Neb. —.

⁶¹. In re Carley, 8 A. B. R. 720, 117 Fed. 130 (C. C. A. N. J.).

⁶². Obiter, In re Crist, 9 A. B. R. 1, 116 Fed. 1007 (D. C. Ala.); In re Daugherty, 26 A. B. R. 550, 189 Fed. 239 (D. C. Ky.).

of this view. We cannot agree with that learned author in the proposition that further pleading was necessary. There is no rule in bankruptcy which requires in such cases any further pleading by a bankrupt. By the mode of procedure, uniform in this district, at least, the bankrupt files a petition for a discharge, in which he avers that he has complied with all the provisions of the Bankrupt Act. This is his pleading, and upon it the proper notice is served upon all creditors. The prayer of this petition will be granted as of course, unless some creditor objects and specifies his grounds of objection. If the grounds are specified, the case goes to the referee as the next step to ascertain and report the facts. Unless the specified grounds are established by the proof, the discharge is granted. Nothing is taken for granted, and the onus is on the creditor. Failure to establish the objections by evidence cannot be a ground for refusing the discharge, and it follows logically and inevitably from this fact that no further pleading is necessary upon the part of the bankrupt. The proof must be taken in any event, and without proof the creditor fails. The bankrupt may rely upon the presumption of innocence."

In *re Hendrick*, 14 A. B. R. 795, 138 Fed. 473 (D. C. Conn.): "The bankrupt had the right to file whatever papers he might see fit to file, but he was under no compulsion to file any. The specifications of objection required proof, and, until a sufficient quantity of proof had been presented to the master, no valid objection to a discharge existed, and no testimony should have been heard, except such as had for a foundation a valid specification of objection."

§ 2624. But May Be Filed.—But the bankrupt may file answer thereto if he desires to do so.⁶³

DIVISION 5.

HEARING UPON SPECIFICATIONS OF GROUNDS OF OBJECTION TO DISCHARGE.

SUBDIVISION "A."

BEFORE WHOM HEARING TO BE HELD.

§ 2625. Final Hearing on Discharge to Be before Judge.—Upon the filing of the specifications, hearing is had.

The final hearing upon the petition for discharge and specifications of grounds of objection thereto is to be held before the judge. The hearing may not be held before the referee as such.⁶⁴ His functions as referee are confined solely to questions arising out of the administration of the estate. The law contemplates that the hearings upon petitions for adjudication of bankruptcy, for confirmation of compositions and for discharge must be had before the judge.⁶⁵

⁶³. In *re Hendrick*, 14 A. B. R. 795, 138 Fed. 473 (D. C. Conn.).

⁶⁴. In *re Taylor*, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.), quoted at § 2430¼. Compare peculiar practice in Iowa, In *re Goodhile*, 12 A. B. R. 380, 130 Fed. 731 (D. C. Iowa); also in one district of New York, In *re Pincus* 17 A. B. R. 331, 147 Fed. 621 (D. C. N. Y.).

⁶⁵. Bankr. Act, § 38 (a) (4). In *re McDuff* (Watson *v.* McDuff), 4 A. B.

R. 110, 101 Fed. 241 (C. C. A. La.); In *re Rauchenplat*, 9 A. B. R. 763, 1 P. R. 471 (D. C. Porto Rico); *Fellows v. Freudenthal*, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.); In *re Johnson*, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ark.); In *re Hockman*, 30 A. B. R. 921, 205 Fed. 330 (D. C. Pa.). Also see ante, § 2457.

See as to peculiar practice in Iowa, In *re Goodhile*, 12 A. B. R. 380, 130 Fed. 782 (D. C. Iowa).

And a "certificate of conformity" is wholly unauthorized.⁶⁶

§ 2626. But Judge May Refer Issues to Special Master.—But the judge may refer the issues to a special master.⁶⁷

Fellows v. Fraudenthal, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.): "In §§ 38 and 39 the jurisdiction and duties of referees are specifically enumerated, but the matter of hearing applications for a discharge is not included, either in direct terms or inferentially, while subdivision 4 of § 38 clearly excepts such hearings from his jurisdiction. Moreover, § 14b expressly provides that 'the judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto.' As the district courts are invested with jurisdiction both at law and in equity, to 'enable them to exercise original jurisdiction in bankruptcy proceedings' (§ 2), the power unquestionably exists to order a reference for the purpose of the hearing pursuant to the equity practice; and it would be practically impossible to conduct the hearings otherwise in districts like the northern district of Illinois, with the press of other business, and cases in Bankruptcy under the present act numbering in the thousands. The reference is then made to the referee in the capacity of special master, not as referee in bankruptcy, and for a duty independent of the latter office, and in no sense incompatible. To avoid confusion, it would seem better practice to designate the appointee as special master for the purpose in the order, but the fact that the name of 'referee' or 'referee in bankruptcy' is retained instead cannot affect his performance of the duties. His report is advisory only, and the final hearing is before the district judge."

In re Rauchenplat, 9 A. B. R. 763, 1 P. R. 471 (D. C. Porto Rico): "The application for discharge must, by § 14 of the Bankrupt Law, and General Order in Bankruptcy No. 12 § 3, be heard and decided by the judge of the court. The referee has no jurisdiction to determine the question, but the court may refer the case to him generally for a report. He aids the court like a master in chancery. He cannot finally determine the question of discharge or nondischarge, but he may be ordered to report the facts and his recommendation or conclusion as to the matter. This is merely to aid the judge, and the court then determines the matter. The practice in bankruptcy is much like that in equity, and it is hardly supposable that the law-making power intended that a court, if it saw proper, should not avail itself of such aid. *In re Kaiser*, 3 Am. B. R. 767, 99 Fed. 689."

It is not necessary, though customary, to appoint the referee as special master. Another person may be appointed.⁶⁸

§ 2627. Motions and Demurrers to Be to Judge, Not to Special Master.—Motions for leave to amend must be made to the judge, not to the special master.⁶⁹ Likewise, demurrers and motions to strike out mat-

⁶⁶. See ante, § 2428½.

⁶⁷. Gen. Ord. No. 12, § 3: "But he (the judge) may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts."

Woods v. Little, 13 A. B. R. 742, 134 Fed. 229 (C. C. A. Penn.); *In re Kaiser*, 3 A. B. R. 767, 99 Fed. 609 (D. C. Minn.); *Watson v. McDuff*, 4 A. B. R. 110, 101 Fed. 241 (C. C. A. La.); *In*

re Gillardon, 26 A. B. R. 103, 187 Fed. 289 (D. C. Pa.).

⁶⁸. *In re Gillardon*, 26 A. B. R. 103, 187 Fed. 289 (D. C. Pa.).

⁶⁹. *Ky. Nat'l Bk. v. Carley*, 10 A. B. R. 375, 121 Fed. 822 (C. C. A. N. J.); *In re Peck*, 9 A. B. R. 747, 120 Fed. 972 (D. C. Conn.); *In re Kaiser*, 3 A. B. R. 770, 99 Fed. 689 (D. C. Minn.); *In re Burk*, 3 N. B. R. 296; *In re McIntyre*, 1 N. B. N. 115; *In re Wolfen-*

ter from the specifications or to require them to be made definite and certain, etc., must be made before the judge;⁷⁰ also, the application of one objecting creditor, whose own specifications are insufficient, to avail himself of specifications filed by another creditor.⁷¹ But objections to the introduction of any evidence under the specifications, although sometimes called "in the nature of" a demurrer, are, of course, to be heard in the first instance by the special master.

SUBDIVISION "B."

FUNCTIONS AND DUTIES OF SPECIAL MASTER ON DISCHARGE.

§ 2628. **Hearings before Special Master.**—Hearings before the special master are in general to be held in accordance with federal equity practice.⁷²

§ 2629. **Whether Special Master to Exclude Improper Evidence.**—It has been ruled in some cases that the special master must take down all the evidence excluded by him under objection and exception.⁷³

Missouri Elect. Co. v. Hamilton-Brown Co., 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.): "It is the duty of examiners, masters, referees, and the court, when taking evidence in controversies therein in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without

sohn, 5 A. B. R. 60 (Ref. N. Y.). Compare, *contra* inferentially, *In re Quackenbush*, 4 A. B. R. 274, 102 Fed. 282 (D. C. N. Y.). Analogously, *In re Baldwin*, 9 A. B. R. 591, 119 Fed. 796 (D. C. N. Y.).

70. *In re Baldwin*, 9 A. B. R. 591, 119 Fed. 796 (D. C. N. Y.), by local rule. Compare, on the facts in accord, *In re Brockman*, 21 A. B. R. 251, 168 Fed. 1015 (D. C. Ky.).

71. *In re Wetmore*, 6 A. B. R. 703, 102 Fed. 290 (Special Master N. Y.).

72. *In re Lipsett*, 9 A. B. R. 32, 119 Fed. 379 (Ref. N. Y.); *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. C.); *Bank v. Johnson*, 16 A. B. R. 209, 143 Fed. 463 (C. C. A. W. Va.). Compare, also, *In re Fritz*, 23 A. B. R. 84, 173 Fed. 560. *In re Charles J. Pierce, Jr.*, 32 A. B. R. 96, 210 Fed. 389 (D. C. Wash.).

Whose Duty to Bring on Hearing before Special Master.—As to whose duty it is to bring on the hearing before the special master, see *In re Eldred*, 18 A. B. R. 243, 152 Fed. 491 (D. C. N. Y.).

Findings to Be Based on Evidence Introduced in Opposition, Not on Facts Known Otherwise.—*In re Walder*, 18 A. B. R. 419, 152 Fed. 489 (D. C. Conn.).

Creditor's Abandonment of Further Opposition.—*In re Walder*, 18 A. B. R. 419, 152 Fed. 489 (D. C. Conn.); *In re Hendrick*, 14 A. B. R. 795, 138 Fed. 473 (D. C. Conn.). Compare, "Buying Off Opposition to Discharge," § 2814.

Presence of Witnesses Necessary.—*In re Rubin & Lipman*, 32 A. B. R. 295, — Fed. — (D. C. N. Y.).

73. *Bank v. Johnson*, 16 A. B. R. 209, 143 Fed. 463 (C. C. A. W. Va.); *In re Lipsett*, 9 A. B. R. 32, 119 Fed. 279 (Ref. N. Y.). Compare, *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. C.). Compare, *In re DeGottardi*, 7 A. B. R. 746, 114 Fed. 328 (D. C. Calif.); apparently, *In re Knaszak*, 18 A. B. R. 188, 151 Fed. 503 (D. C. N. Y.); *In re Haskell*, 20 A. B. R. 914, 164 Fed. 301 (D. C. N. Y.); *Nat'l Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.); *In re Isaacson*, 23 A. B. R. 665, 175 Fed. 202 (D. C. N. Y.).

remanding the suit to procure the rejected evidence. From this rule evidence plainly privileged, the testimony of privileged witnesses, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, and immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are expected."

In *re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va.): "The first question presents little difficulty. In *re Wilde's Sons*, 11 Am. B. R. 714, 131 Fed. 142, it is held, that a referee acting in his character of referee or as special commissioner has the right to exclude evidence which he deems inadmissible. But many other cases hold the contrary. In *re Lipset*, 9 Am. B. R. 32, 119 Fed. 379, it is held, that hearings before the referees are substantially the same as in equity, subject, in effect, to equity rule 67, and therefore it is the duty of the referee, although he must rule on any objections made to testimony offered, to take all excluded testimony and make the same a part of the record, with his ruling on the objections, and also the exceptions which may be taken noted in connection with such testimony. It is clearly set forth in this case that the reason for this procedure is to enable the judge on a review not to reverse a decision made because of the error of the referee in excluding evidence, but enable such judge to at once, without reference back to such testimony, to determine the issue upon the proper testimony, disregarding that which was improper. * * *

"But it is needless to adduce further authority touching this point, for, in my judgment, General Order in Bankruptcy No. XXII, fully determines it. The latter clause of this order provides:

"The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

"It is clear to me that in taking testimony the referee must have it taken down, preferably in narrative form, but, upon objection raised, it is his duty to require the matter to be presented by question, to which the objection and reason thereof is to be clearly but briefly noted; then to enter his ruling thereon as to whether proper or not, and, although he may rule it to be improper, yet allowed it to be answered. I am persuaded, however, that he is not called upon to suffer and allow counsel, as in this case, to ask and permit witnesses to answer the same question over and over again, whereby time is unnecessarily consumed and costs incurred, but that upon his noting the fact that the question has been once answered, or the demand to answer has been once positively refused, the court will justify him in preventing vain repetition. Applying these rules to this case, it is clear that the referee and the attorneys engaged all had a wrong conception of his power in the start; that they discovered their error; that the referee corrected all impossible injury by recalling the witness and permitting the questions to be propounded again which he had ruled out; and that, if the witness was influenced to refuse to answer because of his ruling the questions to be improper, the referee was not blamable, because it was his duty to rule, and the witness alone could at his peril refuse to answer. There was therefore in this first proposition nothing to warrant this rule against the referee."

But the more practicable rule is that the special master should exclude incompetent and irrelevant evidence, but should permit to be stated (if desirable, in the words of the witness himself), as part of the exception to the ruling, what the evidence offered would have been if admitted. This method

preserves the rights of all parties and subserves the purposes of review quite as well as the first method, and does not carry with it the implication that the special master has no control over the introduction of evidence.⁷⁴

In *re Wilde's Sons*, 11 A. B. R. 714, 131 Fed. 142 (D. C. N. Y.): "A referee in bankruptcy, whether acting in his character as referee or as special commissioner, has the right to exclude evidence which he deems inadmissible."

Inferentially, In *re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.): "The authority of the referee is not limited to the taking and reporting of the evidence and ruling as to its admissibility. In addition to that, it is competent and desirable that he shall report finding and recommendations. * * * The referee should not disregard the specifications, and should confine the evidence to the material facts alleged in the specifications."

"The referee has authority to rule upon the sufficiency of the specifications of objections, and should not take evidence on such as are clearly insufficient. Application to amend specifications should be made to the judge."

§ 2630. Findings of Fact as Well as Evidence to Be Reported.—And the special master must report his findings of fact, not merely the evidence.⁷⁵ And such findings must be based on the proofs taken before the master. It is error to base findings on the verdict of a jury in another proceeding, or the judgment of another tribunal, even though the same question was tried out before it on substantially the same facts.⁷⁶

§ 2631. Also Conclusions of Law.—And the special master may report whether the objections have been sustained, as well as merely the facts themselves.⁷⁷

§ 2632. Exceptions to Special Master's Report and Findings.—Exceptions to the special master's report and findings should be made in accordance with Federal Equity Rule 83 as construed in *Scheffield v. Gordon*, 151 U. S. 285, except as otherwise provided in the act.⁷⁸

§ 2633. Court Presumed to Have Investigated Case on Merits, on Master's Report.—Upon confirming the report of a referee as special master and granting a discharge, it will be presumed the court investigated the case on the merits.⁷⁹

⁷⁴ In *re Wolfensohn*, 5 A. B. R. 60 (Special Master N. Y.).

Reserving Decision as to Admissibility.—The special master may reserve decision as to the admissibility of evidence, In *re Knaszak*, 18 A. B. R. 188, 151 Fed. 503 (D. C. N. Y.).

⁷⁵ In *re Steed & Curtis*, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.); In *re Kaiser*, 3 A. B. R. 367, 99 Fed. 689 (D. C. Minn.); *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.).

Separate findings of fact and conclusions of law must be given if demanded. Gen. Ord. XXXVI; In *re Rauchenplat*, 9 A. B. R. 763, 1 P. R.

471 (D. C. Porto Rico).

⁷⁶ In *re Cohan*, 26 A. B. R. 544, 192 Fed. 751 (D. C. N. J.); In *re Mayer*, 28 A. B. R. 342, 195 Fed. 571 (D. C. N. Y.).

⁷⁷ In *re Rauchenplat*, 9 A. B. R. 763, 1 P. R. 471 (D. C. Porto Rico); In *re Kaiser*, 3 A. B. R. 367, 99 Fed. 689 (D. C. Minn.).

⁷⁸ In *re Covington*, 6 A. B. R. 374, 110 Fed. 143 (D. C. N. Car.).

⁷⁹ *Ky. Nat. Bk. of Louisville v. Carley*, 12 A. B. R. 119, 127 Fed. 686 (C. C. A. N. J.). Compare, In *re King*, 24 A. B. R. 606, 179 Fed. 694 (C. C. A. Ills.).

§ 2634. Findings of Fact Not Reversed Except for Clear Error.—

The findings of fact by the special master will not be reversed, except upon clear and convincing proof of error. He has view of the witnesses and may note their demeanor on the stand.⁸⁰

In *re Forth*, 18 A. B. R. 186 (D. C. N. Y.): "The referee was appointed as special master to pass on the facts, and has decided in favor of the bankrupt, after seeing and hearing the witnesses testify and it does not seem to the court that this determination upon these questions can be disregarded, as there is apparently sufficient testimony to support his determination."

In *re Conroy*, 14 A. B. R. 250, 134 Fed. 764 (D. C. Pa.): "He had the witnesses before him, and is therefore better able to judge what weight should be given to their utterances than the court, who must depend upon the written statement."

In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.): "They are based on conflicting testimony, and, in their ascertainment, much depended upon the credibility of the bankrupt. The master was of opinion that no reliance whatever could be given to such of the bankrupt's testimony as was before him. In these circumstances, the record containing other credible evidence to sustain the specifications, the findings of the special master should not be disturbed. The petition for discharge must be denied."

Compare, similar ruling in C. C. A. in discharge case appealed from the District Court Barton Bros. *v.* Produce Co., 14 A. B. R. 504, 136 Fed. 355 (C. C. A. Ark.): "Where, as in this case, the hearing was on oral testimony, his conclusions on disputed questions of fact should not be disturbed by the appellate court, except for cogent reasons, such as a palpable mistake or misconception of the decided weight of the evidence. * * * The learned judge who heard this case patiently for two days, with opportunity to observe the witnesses, their conduct on the stand, with probable personal knowledge of what manner of men they were, was in better position to form a correct estimate of the probative force to be attached to their testimony than this court can form from the more or less imperfect expression of the testimony in type."

Compare, In *re Harr*, 16 A. B. R. 214, 143 Fed. 421 (D. C. Mo.): "The findings of facts by a special master who attended the examination of the witnesses, thus giving him an opportunity of seeing them testify, while not as conclusive as the finding of facts by a jury or a trial judge sitting as a jury, are very persuasive, and if there is substantial testimony to sustain his findings uninfluenced by any mistaken conclusions of law they will not be disturbed by the court hearing the cause on a transcript of the evidence without opportunities to see the witnesses and thus to judge of their credibility in the same manner as was enjoyed by the master. For these reasons the findings on the objections made by the special master on the first, second, and fourth specifications of objec-

⁸⁰. In *re Covington*, 6 A. B. R. 373, 110 Fed. 143 (D. C. N. Car.); In *re Lafleche*, 6 A. B. R. 482, 109 Fed. 307 (D. C. Vt.); inferentially, In *re Keefer*, 14 A. B. R. 291, 135 Fed. 885 (D. C. N. Y.); In *re Shriver*, 10 A. B. R. 746, 125 Fed. 511 (D. C. Pa.); In *re Baernkopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.). Compare similar ruling in C. C. A. in discharge cases, appealed from District Court, *Osborne v. Perkins*, 7

A. B. R. 250, 112 Fed. 127 (C. C. A. Mass.).

Compare post, §§ 2861, 3009. In *re Schwartz*, 23 A. B. R. 37, — Fed. — (D. C. N. Y.); *obiter*. In *re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.); In *re Doyle*, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.); In *re McCann*, 24 A. B. R. 789, 179 Fed. 575 (D. C. Pa.); In *re Walter W. Chamberlain*, 25 A. B. R. 37, 180 Fed. 304 (D. C. N. Y.).

tions and on the claim of Wood Bros. will not be disturbed, although the testimony is conflicting, and but for the findings of the special master the court might have reached different conclusions."

SUBDIVISION "C."

BURDEN OF PROOF: DECREE OF PROOF: ADMISSIBILITY OF EVIDENCE AND CREDIBILITY OF WITNESSES ON DISCHARGE.

§ 2635. **Burden of Proof on Opposing Creditor.**—The opposing creditor has the burden of proof on opposition to discharge.⁸¹ The mere filing of the specifications is not such denial of the petition as to throw the burden of disproof on the bankrupt.

In re Troeder, 17 A. B. R. 731 (C. C. A. Mass.): "All agree that the burden of proof exists on the objecting creditors but the gravamen of proof is variously stated."

§ 2636. **But Presumptions of Fact May Shift against Bankrupt, and Compel Rebuttal.**—But the presumptions may shift against the bankrupt so as to compel him to rebut them;⁸² as where he fails to account reasonably for shortage of assets or to explain reasonably his inability to do so;⁸³ or where an omission of assets is once shown, the duty then arising for the bankrupt to explain it.⁸⁴

81. In re Boasberg, 1 A. B. R. 353 (Special Master N. Y.); In re Ferris, 5 A. B. R. 246, 105 Fed. 356 (D. C. Iowa); In re Logan, 4 A. B. R. 525, 102 Fed. 876 (disapproved, on other grounds, In re Dow, 5 A. B. R. 400, 105 Fed. 889); In re Gaylord, 5 A. B. R. 411, 106 Fed. 833 (affirmed in 7 A. B. R. 1, 112 Fed. 668, C. C. A. N. Y.); In re Corn, 5 A. B. R. 478, 106 Fed. 143 (D. C. Ga.); In re Holman, 1 A. B. R. 600, 92 Fed. 512 (D. C. Iowa); In re Hixon, 1 A. B. R. 610, 93 Fed. 440 (D. C. Iowa); In re Chamberlain, 11 A. B. R. 95, 125 Fed. 629 (D. C. N. Y.); In re Kalster, 17 A. B. R. 52 (D. C. Nev.); In re Idzall, 2 A. B. R. 741, 96 Fed. 314 (D. C. Iowa); In re Phillips, 3 A. B. R. 542, 98 Fed. 844 (D. C. N. Y.); In re Wetmore, 3 A. B. R. 700, 99 Fed. 703 (D. C. Pa.); In re Keefer, 14 A. B. R. 290, 135 Fed. 885 (D. C. N. Y.); In re Howden, 7 A. B. R. 194, 111 Fed. 723 (D. C. N. Y.); In re Hamilton, 13 A. B. R. 335, 133 Fed. 823 (D. C. N. Y.); In re Locks, 5 A. B. R. 139, 104 Fed. 783 (D. C. N. Y.); In re Eades, 16 A. B. R. 30, 143 Fed. 293 (C. C. A. Ills.); In re McGurn, 4 A. B. R. 459, 102 Fed. 743 (D. C. Nev.); In re May, 2 N. B. N. & R. 95 (Ref. N. Y.); In re Garrison, 17 A. B. R. 332 (C. C. A. N. Y.); In re Cohen, 18 A. B. R. 85, 149 Fed. 178 (D. C. N. Y.); [1867] In re Hill, Fed. Cas. 6482; [1841] In

re Herdic, 1 Fed. 242; In re Brockman, 21 A. B. R. 251, 168 Fed. 1015 (D. C. Ky.); In re Irving Cohen, 30 A. B. R. 653, 206 Fed. 457 (C. C. A. N. Y., reversing S. C., 29 A. B. R. 698); In re Copleman, 30 A. B. R. 414, — Fed. — (D. C. Mich.); In re Main, 30 A. B. R. 547, 205 Fed. 421 (D. C. Iowa); In re Shear, 29 A. B. R. 688, 201 Fed. 460 (D. C. N. Y.); instance, In re Mintzer, 28 A. B. R. 743, 197 Fed. 647 (D. C. N. Y.); instance, In re Bouck, 28 A. B. R. 378, 199 Fed. 453 (D. C. N. Y.); In re J. B. Cason, 27 A. B. R. 903 (Ref. Miss.); In re Walter W. Chamberlain, 25 A. B. R. 37, 180 Fed. 304 (D. C. N. Y.).

82. In re Leslie, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.); In re Arenson, 28 A. B. R. 113, 195 Fed. 609 (D. C. N. J.).

83. In re Finkelstein, 3 A. B. R. 800, 101 Fed. 418 (D. C. N. Y.); Seigel v. Cartel, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa); instance, In re Friederich, 28 A. B. R. 656, 199 Fed. 193 (D. C. Minn.); In re Miller, 30 A. B. R. 113, 203 Fed. 170 (D. C. N. Y.); In re Copleman, 30 A. B. R. 414, — Fed. — (D. C. Mich.).

84. In re Rauchenplat, 9 A. B. R. 766, 1 P. R. 471 (D. C. Porto Rico); Seigel v. Cartel, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa), quoted at § 2501½.

Again, where it is sought to explain an omission to make entries on the books of payments to relatives by attributing it to the negligence of the bookkeeper, the bankrupt is under the further duty of explaining how and under what circumstances the bankrupt notified the bookkeeper of such payments, and the bookkeeper himself should be produced as a witness, if accessible, in the absence whereof the claim that the omission occurred through mere negligence in bookkeeping may be rejected.⁸⁵

Nevertheless the burden of proof still rests on the opposing creditors; for the discharge must be granted unless it is proved to be barred; that is to say, the discharge is a presumptive right, not a privilege to be granted on proof that it is earned.⁸⁶

§ 2637. Burden of Proof Is on Objecting Creditor as to Each Element of Ground Charged.—The burden of proof is on the objecting creditor as to each element necessary to be proved.

Thus, where the ground is the commission of the crime of concealing assets or of making a false oath, each element of the crime must be proved and be proved by the requisite degree of proof.⁸⁷

§ 2637½. Proof Aided by Presumptions.—Proof may be aided by presumptions. Thus, the bankrupt will be presumed to have intended the natural and probable consequences of his acts.⁸⁸

§ 2638. Evidence Need Not Be beyond Reasonable Doubt.—The evidence to prove the bar need not be beyond a reasonable doubt in any case.⁸⁹

In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.): "The contention made by appellant that the same high degree of proof is here required to sustain the objection to his discharge on the ground of making a false oath to his schedules that would be required to support a conviction against him on a charge of perjury for such false swearing is not sound. The hearing of the bankrupt's application for a discharge from his unpaid

⁸⁵. In re Haskell, 20 A. B. R. 914, 164 Fed. 301 (D. C. N. Y.).

⁸⁶. Bankr. Act, § 14 (b). See ante, "Nature and Grounds of Opposition," § 2469.

⁸⁷. In re Garrison, 17 A. B. R. 832 (C. C. A. N. Y.); impliedly, *Fellows v. Freudenthal*, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.); instance, failure to prove the forbidden intent. *Smith v. Keegan*, 7 A. B. R. 4, 111 Fed. 157 (C. C. A. Mass.).

For further instances, see the cases cited under each ground of objection, ante, division 3.

Prior Adjudication and Commitment for Contempt for "False Oath" Prima Facie Case.—In re Shear, 29 A. B. R. 688, 201 Fed. 460 (D. C. N. Y.); In re Krall, 28 A. B. R. 452, 196 Fed. 402 (D. C. Conn.).

⁸⁸. In re Nelson, 23 A. B. R. 37, 179 Fed. 320 (D. C. N. Y.); also compare similar proposition as to commission of acts of bankruptcy, ante, §§ 112, 132.

⁸⁹. In re Gross, 5 A. B. R. 271 (Ref. N. Y.); In re Greensberg, 8 A. B. R. 94, 114 Fed. 773 (D. C. Conn.); In re Salisbury, 7 A. B. R. 771, 113 Fed. 833 (D. C. N. Y.); In re Marcus & Scherr, 28 A. B. R. 164, 192 Fed. 743 (D. C. N. Y.); In re Shear, 29 A. B. R. 688, 201 Fed. 460 (D. C. N. Y.); *Garry v. Jefferson Bank*, 26 A. B. R. 511, 186 Fed. 461 (C. C. A. Ala.); In re Bacon, 30 A. B. R. 585, 205 Fed. 545 (D. C. N. Y.); In re Doyle, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.); In re Walter W. Chamberlain, 25 A. B. R. 37, 180 Fed. 304 (D. C. N. Y.).

liabilities, on objection made thereto, was in no sense a criminal proceeding, to be followed in the event of his conviction by a forfeiture of either his liberty or property by way of punishment. The sole injurious consequence resulting to the bankrupt on sustaining such objections was to deny him a discharge from further liability of his just debts dischargeable by the law. True, the disclosures made by the proofs on such hearing might reflect injuriously on the conduct of the bankrupt. So might the evidence taken in the trial of any cause or proceeding. The presumption is that men are honest; that their acts were prompted by an honest purpose. He who charges to the contrary, in order to prevail, must offer such clear and convincing proofs as will overcome this presumption and the proofs offered to refute the charge made, and thus satisfy reasonable minds of the truth of the charge."

In *re Howden*, 7 A. B. R. 191, 111 Fed. 723 (D. C. N. Y.): "The authorities are unanimous in holding that the burden is upon the opposing creditor to prove his objections, not necessarily beyond a reasonable doubt, but by clear and convincing testimony."

In *re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.): "It is not necessary to establish this concealment of assets beyond a reasonable doubt, but by a fair preponderance of credible evidence only."

In *re Delmour*, 20 A. B. R. 405, 161 Fed. 589 (D. C. N. Y.): "With the cases holding, or seeming to hold, that anything more than a fair preponderance of creditable testimony is necessary to require the court to deny a discharge, I do not agree. In my judgment the law is properly stated in *In re Leslie*, 9 A. B. R. 561, 119 Fed. 406, viz, that it is not necessary to establish concealment of assets beyond a reasonable doubt, but by a fair preponderance of creditable testimony only. Viewed in this light, the referee's report is entirely satisfactory. The testimony against the bankrupt was clear and direct. It may be admitted that it came from interested witnesses; but there are no more interested witnesses than the bankrupt and his wife. Their testimony in opposition is both shuffling and evasive, and that of the bankrupt can even from the printed page be seen to have been contemptuous."

Thus, as to failure to keep proper books of account.⁹⁰

Thus, as to concealment of assets.⁹¹

Thus, as to false oath.⁹²

§ 2639. But Where "Offense" Is Charged, Evidence to Be "Clear," "Satisfying" or "Convincing."—But where the ground urged is the commission of the crime of concealing assets, or of making a false oath, the proof must be "clear," "satisfying" or "convincing."

The cases do not, all of them, enunciate the rule in these precise terms, but the consensus of the authorities will be found to establish the rule in terms substantially as given.⁹³

^{90.} In *re Steed & Curtis*, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.); In *re Lafleche*, 6 A. B. R. 483, 109 Fed. 307 (D. C. Vt.); In *re Bryant*, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.); In *re Polakoff*, 1 A. B. R. 358 (Special Master, affirmed by D. C.); *Garry v. Jefferson Bank*, 26 A. B. R. 511, 186 Fed. 461 (C. C. A. Ala.).

^{91.} In *re Delmour*, 20 A. B. R. 405, 161 Fed. 589 (D. C. N. Y.).

^{92.} In *re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

^{93.} In *re Troeder*, 17 A. B. R. 732 (C. C. A. Mass.); In *re Rauchemplat*, 9 A. B. R. 763, 1 P. R. 471 (D. C. Porto Rico); In *re Corn*, 5 A. B. R. 478, 106 Fed. 143 (D. C. Ga.); In *re Gay-*

In re Leslie, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.): "The evidence must be satisfactory."

In re Dauchy, 10 A. B. R. 527, 122 Fed. 688 (D. C. N. Y.): "This court has held (In re Leslie, 9 A. B. R. 561, 119 Fed. 406), and holds, that the concealment of property in these cases need only be shown by a fair preponderance of satisfactory evidence. This is not a criminal proceeding, in any sense.

But compare, Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.): "Conceding that not every concealment which is sufficient to bar a discharge will result in an indictment and conviction, it is nevertheless true, that the words 'knowingly' and 'fraudulently' must have their natural significance given to them, when considering a charge of concealment made in opposition to a discharge. It must at least appear, by a clear preponderance of testimony, that the concealment charged was practiced knowingly and fraudulently."

§ 2640. Whether Same Degree of Proof Requisite Where Ground Charged Not a Punishable Offense.—And the same degree of proof seems to have been required, according to some decisions, in cases of objections for failure to keep proper books of account, especially before the amendment of 1903.⁹⁴ But it would seem, on principle, that the evidence need not be "convincing," nor "satisfying," where no crime is charged.

§ 2641. "General Examination" of Bankrupt Admissible.—Testimony of the bankrupt, given upon his general examination, may be used in

lord, 7 A. B. R. 1, 112 Fed. 668 (affirming 5 A. B. R. 410, 106 Fed. 833 (C. C. A. N. Y.)); In re Howden, 7 A. B. R. 1, 111 Fed. 723 (D. C. N. Y.); In re Hamilton, 13 A. B. R. 335, 133 Fed. 823 (D. C. N. Y.); In re Salisbury, 7 A. B. R. 770, 113 Fed. 833 (D. C. N. Y.); In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Penn.); In re Steed & Curtis, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.); In re Wetmore, 3 A. B. R. 700, 99 Fed. 703 (D. C. Pa.); In re McGurn, 4 A. B. R. 459, 102 Fed. 743 (D. C. Nev.); Fellows v. Freudenthal, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.); In re Marsh, 2 N. B. N. & R. 649; In re Berner, 4 A. B. R. 383 (Ref. Ohio, affirmed by D. C.); In re May, 2 N. B. N. & R. 93; In re Cornell, 3 A. B. R. 172, 97 Fed. 31 (D. C. N. Y.); In re Cohen, 18 A. B. R. 85 (D. C. N. Y.); In re Cann, 6 A. B. R. 217 (D. C. Ore.); Inferentially, In re Covington, 6 A. B. R. 373, 110 Fed. 143 (D. C. N. Car.); In re Lafleche, 6 A. B. R. 482, 109 Fed. 307 (D. C. Vt.); In re Ferris, 5 A. B. R. 246, 105 Fed. 356 (D. C. Iowa); In re Fitchard, 4 A. B. R. 609, 103 Fed. 742 (D. C. N. Y.); In re Bryant, 5 A. B. R. 114, 104 Fed. 789 (D. C. Tenn.); In re Polakoff, 1 A. B. R. 358 (Special Master's Report, affirmed by D. C. N. Y.).

That mere preponderance of credible evidence sufficient even in such cases. In re Leslie, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.); In re Delmour, 20 A. B. R. 405, 161 Fed. 589 (D. C. N. Y.); In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.), quoted at § 2638.

In re Hennebry, 31 A. B. R. 231, 207 Fed. 882 (D. C. Iowa); In re Wakefield, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.); In re Bacon, 30 A. B. R. 585, 205 Fed. 545 (D. C. N. Y.); In re Walter W. Chamberlain, 25 A. B. R. 37, 180 Fed. 304 (D. C. N. Y.); In re Mayer, 28 A. B. R. 342, 195 Fed. 571 (D. C. N. Y.); In re Taylor, 26 A. B. R. 143, 188 Fed. 479 (D. C. Ala.).

That a prior adjudication on that a bankrupt had made a false oath establishes a prima facie case. In re Shear, 29 A. B. R. 688, 201 Fed. 460 (D. C. N. Y.).

⁹⁴ In re Hamilton, 13 A. B. R. 335, 133 Fed. 823 (D. C. N. Y.); In re Chamberlain, 11 A. B. R. 95, 125 Fed. 629 (D. C. N. Y.). But see, In re Hirsch, 2 A. B. R. 715, 96 Fed. 468 (D. C. Tenn.); also, after the amendment. In re Garrison, 17 A. B. R. 832 (C. C. A. N. Y.); Garry v. Jefferson Bank, 26 A. B. R. 511, 186 Fed. 461 (C. C. A. Ala.).

opposition to his discharge.⁹⁶

Even if not written out nor signed, the testimony of a stenographer or other witness who heard it is competent to prove it.⁹⁷

In *re Bard*, 5 A. B. R. 810, 108 Fed. 208 (D. C. N. Y.): "In the present case it appears that the bankrupt's testimony upon his previous examination was not formally signed by him, although numerous adjournments were signed by him on the minutes. When his testimony was offered in support of the specifications, it was rejected, apparently on the ground of incompetency alone, and not because it had not been signed, or because the bankrupt might wish to make corrections in the written statement. The testimony was competent and should be received when properly evidenced. Proper evidence of what his testimony was, would be either his own signature and verification, or, in the absence of that, the testimony of the person who took the minutes. The latter, in fact, is the ordinary mode of proving the testimony of a party given on a previous trial in an independent cause. Subsequently, before the referee, the person who took the notes of the bankrupt's examination testified that the notes of the testimony were truly and correctly taken. The testimony was then again offered and again rejected. It should have been received. The signature of the bankrupt was no longer necessary; nor was it necessary that he should be directed either to sign it, or correct it, if he wished. By the testimony of the witness it was duly proved and was competent. Thenceforward the burden was upon the bankrupt to overcome it."

But such general examination is not to be considered as in evidence unless actually introduced or stipulated in.⁹⁸

§ 2642. Competent Though Crime Charged.—And such testimony is competent, although a crime is charged, the opposition to a discharge not being a criminal proceeding.⁹⁹

§ 2643. But of Other Witnesses, Not Admissible.—Testimony of other witnesses taken upon general examination is not admissible in opposition to discharge.¹

⁹⁶. In *re Dow*, 5 A. B. R. 400, 105 Fed. 889 (D. C. Iowa); In *re Gaylord*, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y., affirming 5 A. B. R. 410); In *re Bard*, 5 A. B. R. 810, 108 Fed. 208 (D. C. N. Y.).

In *re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.): It is admissible either as an admission or in contradiction of his testimony given on the discharge hearing.

In *re Goodhile*, 12 A. B. R. 380, 130 Fed. 782 (D. C. Iowa); analogously, In *re Wiesen Bros.*, 14 A. B. R. 347, 135 Fed. 442 (D. C. Pa.); In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.); contra, In *re Marx*, 4 A. B. R. 521, 102 Fed. 676 (D. C. Ky.), and In *re Logan*, 4 A. B. R. 525 (D. C. Ky., disapproved by C. C. A. in In *re Gaylord*, 7 A. B. R. 1, 112 Fed. 668, and by D. C. Iowa, in In *re Dow*, 5 A. B. R. 400, 105 Fed. 889).

⁹⁷. *Obiter*, In *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.).

⁹⁸. In *re Murray*, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.); In *re Walder*, 18 A. B. R. 419, 152 Fed. 489 (D. C. Conn.).

⁹⁹. In *re Dow*, 5 A. B. R. 400, 105 Fed. 889 (D. C. Iowa); In *re Gaylord*, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y., affirming 5 A. B. R. 410); In *re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.); In *re Goodhile*, 12 A. B. R. 380, 130 Fed. 782 (D. C. Ia.); In *re Krueger*, 2 Low. 182; In *re Marx*, 4 A. B. R. 521, 102 Fed. 676 (D. C. Ky.); contra, In *re Logan*, 4 A. B. R. 525 (D. C. Ky.).

As to his testimony in state court proceedings, see In *re Eaton*, 6 A. B. R. 531, 110 Fed. 731 (D. C. N. Y.).

1. In *re Goodhile*, 12 A. B. R. 380, 130 Fed. 782 (D. C. Iowa); In *re Wil-*

§ 2644. **Unless So Stipulated.**—But such testimony is admissible if so stipulated.²

The testimony of the bankrupt actually given elsewhere but admitted by stipulation of counsel as part of the bankrupt's general examination, without being actually resworn to by the bankrupt, cannot, however, constitute a false oath to bar discharge.³

§ 2645. **Ordinary Rules Determine Admissibility and Credibility.**—The ordinary rules determining the credibility of witnesses and the admissibility of evidence prevail in hearings in opposition to discharge. Thus, the proof must support the specifications alleged; evidence of grounds not alleged being immaterial.⁴

§ 2646. **Failure to Produce Material Witnesses Who Are Accessible.**—Failure to produce material witnesses who could have assisted the bankrupt in accounting for the disappearance of his estate may be evidence against him.⁵ As, for instance, failure to produce the bookkeeper, where the bankrupt explains the omission of entries of payments to relatives as being due to the bookkeeper's negligence.⁶ Again, where a creditor has sworn positively to allegations in his specifications as being under his own knowledge and yet fails to take the stand, inference unfavorable to the truth of his allegations may be drawn.⁷

§ 2647. **Failure of Creditors to Take Steps to Recover Property Alleged Fraudulently Concealed.**—Failure of creditors to cause steps to be taken to recover the property alleged to be fraudulently concealed, is to be taken, in a doubtful case at any rate, as an admission that they do not deem the proof of fraud very strong, or that the property did not constitute property "belonging to the estate," after the election of the trustee, so as to constitute concealment of property belonging to the estate "from the trustee."⁸

But the hearing upon the discharge will not be postponed to await the outcome of pending suits for the recovery of assets.⁹

Paxton v. Scott, 10 A. B. R. 81 (Neb.): "The hearing upon this application will not ordinarily be stayed pending protracted litigation in other courts, it being the policy of the Bankrupt Law to secure the debtor's discharge as soon as consistent with justice."

cox, 6 A. B. R. 362, 109 Fed. 628 (C. C. A. N. Y.); *contra* (if the bankrupt be actually present in person or by counsel), *In re Cooke*, 5 A. B. R. 434, 109 Fed. 631 (D. C. N. Y.).

2. *In re Semmel*, 9 A. B. R. 352, 113 Fed. 487 (D. C. Pa.).

3. *In re Goldsmith*, 4 A. B. R. 234, 101 Fed. 570 (D. C. Penn.). Ante, §§ 2530, 2540.

4. *In re Bouck*, 28 A. B. R. 378, 199 Fed. 453 (D. C. N. Y.).

5. *In re Hershkowitz*, 14 A. B. R. 91, 136 Fed. 950 (D. C. N. Y.). Compare,

to same effect as to adverse claims, *In re Maver*, 19 A. B. R. 480, 156 Fed. 432, 157 Fed. 836 (D. C. Pa.), quoted at § 554½.

6. Instance, *In re Haskell*, 20 A. B. R. 914, 164 Fed. 301 (D. C. N. Y.).

7. Inferentially, *In re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va.).

8. *In re Hirsch*, 2 A. B. R. 723, 96 Fed. 468 (D. C. Tenn.). Compare to same general effect, *In re Cason*, 27 A. B. R. 903 (Ref. Miss.).

9. *In re Cornell*, 3 A. B. R. 173, 97 Fed. 29 (D. C. N. Y.). Post, § 2696.

§ 2647½. **Whether Fraudulent Transfer Decree Binding.**—As to whether a decree in a fraudulent transfer suit involving the same transaction is binding on discharge, see post, “*Res Judicata and Estoppel*,” § 2655.

§ 2648. **Evasive Testimony of Bankrupt: Credibility.**—Evasive testimony of the bankrupt is a material consideration in determining the credibility of his testimony.¹⁰

A mere uncorroborated denial of the charges, and of any wrongful intent, is clearly insufficient.¹¹

In *re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.): “Courts are not compelled to accept the bald statements of interested witnesses, or of any witness when his statements are laden with inconsistencies, or burdened with inherent improbabilities, or discredited by incriminating confessions. It is not probable this bankrupt was receiving and paying out so much money to divers individuals at this time that he fails to recollect any of the particulars of this alleged transaction with the trustee.

“There is much in evidence of this bankrupt displaying such gross ignorance, real or pretended, of his business affairs, that the court is justified in holding that his evidence is not entitled to credit on either of two grounds: First, such want of knowledge, memory, and intelligence as to make his testimony unreliable; or, secondly, such an unwillingness to disclose the truth as to wholly discredit him.”

Likewise, as to other witnesses.¹²

§ 2649. **Contradictory Statements and Incredible Explanations.**—So, also, contradictory statements and extraordinary and incredible accounting for the disappearance of assets, are to be taken as indicia of fraud and concealment.¹³

Seigel v. Cartel, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa): “The only tangible explanation of this shortage of funds by the petitioner is that he lost the money in gambling at poker. His evidence was that he had long indulged this habit of gambling, and estimated that he had probably at different times lost an aggregate of \$100,000. As he seems to have been a most unlucky gambler, to say the least, it was not honest for him to thus take the proceeds of the goods he had purchased on credit to indulge his passion at the expense of his confiding creditors. While the statute does not deny the benefit of the

10. In *re O’Gara*, 3 A. B. R. 349, 97 Fed. 932 (D. C. Ore.). Compare, ante, §§ 1568, 2331.

11. In *re Arenson*, 28 A. B. R. 113, 195 Fed. 609 (D. C. N. J.).

12. *Block, trustee v. Rice, trustee*, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.).

13. In *re Hershkowitz*, 14 A. B. R. 86, 136 Fed. 950 (D. C. N. Y.); In *re Leopold*, 5 A. B. R. 279 (Ref. N. Y.); In *re O’Gara*, 3 A. B. R. 349, 97 Fed. 932 (D. C. Ore.). Compare, to same general effect; In *re Conroy*, 14 A. B. R. 250, 134 Fed. 764 (D. C. Pa.); Inferentially, In *re McCormick*, 3 A. B.

R. 340, 97 Fed. 566 (D. C. N. Y.). Also compare, In *re Schlesinger*, 3 A. B. R. 342, 97 Fed. 935 (D. C. N. Y.); In *re Dews*, 3 A. B. R. 691, 96 Fed. 181 (D. C. R. I.); In *re Cotton Co.*, 14 A. B. R. 194 (D. C. Ark.); Too much “I don’t remember.” In *re Weinreb*, 16 A. B. R. 703, 146 Fed. 243 (C. C. A. N. Y.); *Barton Bros. v. Produce Co.*, 14 A. B. R. 502, 136 Fed. 355 (C. C. A. Ark.); In *re Freidman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.); In *re Doyle*, 29 A. B. R. 102, 199 Fed. 247 (D. C. N. Y.). To same effect, ante, § 852.

Bankrupt Act * * * to such a derelict, in administering the beneficent spirit of the act, the court, to prevent it becoming a covert to the delinquent underserver, should see to it that his accounting is clear and free from reasonable doubt. He kept no book account of the withdrawal of this money or its disbursement. He did not introduce any evidence corroborative of the losses at gaming. He failed on close inquiry to give the name of one person with whom he played or the name of the proprietor of the establishment where he played, save one was out of the State and last heard of at the St. Louis World's Exposition, thus making it quite impracticable, if not impossible, for the objecting creditors to contradict him. He could give no particular dates or particular sums lost at 'the sittings.' The credibility and reasonableness of his story were addressed to the judicial discretion of the district judge."

§ 2650. Impeachment of Witness by Inherent Improbability of Own Testimony.—A witness may be as thoroughly discredited by the inherent improbability of his own testimony as by the direct testimony of other witnesses.¹⁴

Inferentially, *In re Henderson*, 12 A. B. R. 351, 130 Fed. 385 (D. C. Pa.): "The question certified by the referee is purely a question of fact, and depends so largely upon the credibility of the testimony that his decision is entitled to more than the usual weight. If the bankrupt's explanation were true concerning the manner in which he spent the large sum of money that he received in a single month, it would certainly have been possible for him to produce some corroborating evidence, and the referee lays proper stress upon the absence of any witness who could speak of the bankrupt's habits of gambling and dissipation, to which he attributes the loss of the money.

"The order of the referee directing the bankrupt to return \$5,000 to his trustee is approved."

Inferentially, *In re Shultz*, 14 A. B. R. 378 (D. C. N. Y.): "The burden of proof rests upon the claimants and though, as a general rule, the referee would be bound by the positive uncontradicted evidence of the petitioner, still if in his judgment such testimony was so indefinite and his statements so conflicting as to raise doubts of the petitioner's sincerity, then he was justified in disbelieving and disregarding such discredited testimony."

Obiter, *In re Friedman*, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y.): "The story of Celia Friedman is inherently preposterous, as well as demonstrably false."

And merely that the witness is uncontradicted does not require the acceptance of his testimony.¹⁵

In re Domenig, 11 A. B. R. 555, 128 Fed. 146 (D. C. Pa.): "Much will necessarily depend on the manner of the witnesses while under examination, and

14. *In re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.); inferentially, *Barton Bros. v. Produce Co.*, 14 A. B. R. 502, 136 Fed. 355 (C. C. A. Ark.); inferentially, *In re Conroy*, 14 A. B. R. 250, 134 Fed. 764 (D. C. Pa.); inferentially, *In re Frankford*, 15 A. B. R. 210 (D. C. N. Y.); *In re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.); to similar effect, ante, § 852; *In re Baum-*

hauer, 24 A. B. R. 179 Fed. 966 (D. C. Ala.).

15. *In re Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.); quoted at § 852. But compare limitations of rule, ante, §§ 554, 555; also see *Neumann v. Blake*, 24 A. B. R. 575, 178 Fed. 916 (C. C. A. Mo.), quoted at § 554.

referees should feel themselves obliged to consider of their own motion the credibility of the witness and of the story that is told, even if there should be no opposing testimony. The mere fact that the witness has not been contradicted does not require the acceptance of the testimony."

§ 2651. Nevertheless Merely Suspicious Circumstances Not Sufficient Where Witness Uncontradicted.—But where the whole proof rests on the sole testimony of the bankrupt himself, merely that the circumstances are suspicious is not enough.¹⁶

§ 2652. Likewise Mere Evasive Testimony and Inability to Account Reasonably for Assets Not Per Se Proof.—Mere evasive and disingenuous testimony of the bankrupt are insufficient to bar discharge even if sufficient to discredit his testimony, if it falls short of sustaining the burden of the proof.¹⁷

In *re Fanning*, 19 A. B. R. 55, 155 Fed. 701 (D. C. N. Y.): "The bankrupt apparently gave evasive and disrespectful answers, but there is nothing to show that he wilfully concealed testimony, preventing the creditors from obtaining the property, and it does not seem that his conduct was such as to merit punishment by refusing to grant him a discharge, inasmuch as the referee apparently did not consider the conduct of the bankrupt when a witness to be worthy of any discipline. The purpose of the penalties of the bankruptcy statute is to prevent bankrupts from concealing their property and defrauding their creditors. Ordinary questions of contumacy or contempt of court can be disposed of directly and of themselves are not to be corrected by the withholding of a discharge."

Likewise, inability of the bankrupt to account reasonably for the disappearance of assets in his possession shortly before bankruptcy is not, per se, proof of his concealment of them.¹⁸

§ 2653. Though Strong Evidence Tending to Discredit.—But is strong evidence tending to prove concealment of them.¹⁹

§ 2654. Judicial Cognizance of Court Records.—Undoubtedly the court should take judicial cognizance of all the records in the case, whether before the judge or the referee. The proper practice however, is to call the attention of the court to the particular part of the record of which judicial cognizance is desired, that the opposing party may have opportunity to rebut the inferences to be drawn therefrom. This is especially true of a bankruptcy proceedings, which is itself made up of a multitude of dependent proceedings wherein the issues are different and the facts variant.

16. In *re Kolster*, 17 A. B. R. 52 (D. C. Nev.); In *re Ferris*, 5 A. B. R. 246, 105 Fed. 356 (D. C. Iowa); In *re Simon*, 29 A. B. R. 808, 197 Fed. 105 (D. C. N. Y.).

17. In *re Gaylord*, 7 A. B. R. 1, 112 Fed. 668 (D. C. N. Y., affirming 5 A. B. R. 410); In *re Leslie*, 9 A. B.

R. 561, 119 Fed. 406 (D. C. N. Y.); In *re Kolster*, 17 A. B. R. 55 (D. C. Nev.); In *re Cohen*, 18 A. B. R. 84 (D. C. N. Y.).

18. In *re Idzall*, 2 A. B. R. 741, 96 Fed. 314 (D. C. Iowa).

19. See cases ante under title "Summary Orders on Bankrupts," § 1851.

And it has been held that the court may take judicial notice of court records in the same court but in different proceedings, but that it is not required to do so.²⁰

§ 2655. Res Judicata and Estoppel.—A decree finding a conveyance fraudulent in a suit in the state court, wherein the bankrupt, trustee (as intervenor) and the fraudulent transferee are parties, is probably binding as *res judicata* on the opposition to discharge so far as the issues are identical, although the purposes of the two proceedings are different.

In *re Skinner*, 3 A. B. R. 163, 97 Fed. 190 (D. C. Iowa): "It further appears in evidence that the trustee, P. A. Sawyer intervened in a suit in equity * * * to which suit * * * the bankrupt was a party and in this suit the trustee set up the alleged fraudulent transfers * * * and upon the hearing of this suit it was adjudged [that the conveyance was fraudulent and should be set aside]. In these proceedings the bankrupt, his wife, and the trustee, representing the creditors, were parties, and the decree must be held binding upon them, and to be conclusive upon the vital question litigated, to wit, whether the transfer to the wife of the property of the bankrupt were or were not fraudulent as to his creditors. Thus, in *Southern Pac. R. R. Co. v. U. S.*, 168 U. S. 1-48, it is said that:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact, once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

"It having, therefore, been conclusively determined in a suit between the bankrupt and his creditors, represented by the trustee, that the bankrupt had conveyed to his wife, without consideration, and with intent to defraud his creditors, property to a large amount, and it appearing from the record in this case that when the bankrupt filed his petition and schedules he stated that he had no property of any kind, except a possible equity of redemption in 1,440 head of sheep mortgaged to a named creditor, the court is justified in finding that the bankrupt has knowingly and fraudulently concealed from his trustee property to a large amount, which in fact forms part of his estate, and therefore, under the provisions of §§ 14 and 29 of the Bankrupt Act, the petitioner is not entitled to a discharge. Judgment accordingly."

In *re Winchester*, 19 A. B. R. 227, 155 Fed. 505 (D. C. Pa.): "In view of this plenary action before a court of competent jurisdiction, the record of which was introduced into this case upon the argument on the exceptions to the report of the special master, there seems to be no reason now for the conclusion arrived at by him upon the less complete and partial hearing had before him, but that the decree in the equity proceedings should control. That decree virtually determines that the bankrupt had no interest in the real estate of his wife subject to the claim of his creditors, and consequently in failing to disclose the expenditures he had made in making these improvements he cannot be guilty of a concealment of assets."

²⁰ In *re Osborne*, 8 A. B. R. 165, 115 Fed. 1 (C. C. A. Mass.).

But compare, analogously and in-

ferentially, *McDonald v. Clearwater Ry. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho).

But compare, *contra*, *In re Cornell*, 3 A. B. R. 172, 97 Fed. 29 (D. C. N. Y.): "The issue in the creditors' suit is not identical with that presented under the specifications in opposition to discharge. A decision adverse to defendants in the creditors' suit would not necessarily determine the right to discharge. If one of the intents of the assignment of April 13, 1896, was to hinder payment of the existing suit, that would authorize a decree for the plaintiff and yet be no sufficient ground to deny a discharge under the Bankrupt Act. To have this effect there must be evidence of concealment of property from the trustee."

Obviously, although all the issues might not be identical, yet, to the extent that they are identical, it would be binding. The parties are not identical, to be sure, but all the parties to the discharge proceedings were parties in the former suit and it is difficult to see how such former finding of fraudulent conveyance could be evaded. Likewise, a former decree between the debtor and the objecting creditor declaring a transfer not fraudulent, has been held *res adjudicata* in bankruptcy;²¹ and between the trustee and an alleged fraudulent transferee declaring the transfer not fraudulent.²²

Similarly, the bankrupt is bound, on discharge, by the allowance of claims by the referee where he has not requested the trustee to object to their allowance.²³

But the discharge in no way precludes the trustee from recovering property which has been fraudulently transferred.²⁴

§ 2656. Discharge Hearing Not Postponed to Await Outcome of Fraudulent Conveyance Suit.—But the hearing upon a petition for discharge will not be postponed to await the determination of a suit in the state court to set aside the fraudulent conveyance complained of as the concealment.²⁵

§ 2657. Declarations of Alleged Fraudulent Transferrer.—Declarations of an alleged fraudulent transferrer have been held admissible for the purpose of impeaching his own title, even if not admissible against the transferee.²⁶

^{21.} *In re McGurn*, 4 A. B. R. 459, 102 Fed. 743 (D. C. Nev.).

^{22.} *In re Tiffany*, 17 A. B. R. 298, 147 Fed. 314 (D. C. N. Y.). Compare, to same effect on revocation of discharge, abandonment of previous fraudulent transfer suit, *In re Mauzy*, 21 A. B. R. 59, 163 Fed. 900 (D. C. W. Va.).

But bankrupt must have been party to former suit. *In re Mayer*, 28 A. B. R. 342, 195 Fed. 571 (D. C. N. Y.).

^{23.} *In re Carton & Co.*, 17 A. B. R. 343 (D. C. N. Y.).

^{24.} *Stephenson v. Bird*, 25 A. B. R. 909, 168 Ala. 422.

^{25.} *Paxton v. Scott*, 10 A. B. R. 81 (Neb.); *In re Cornell*, 3 A. B. R. 173, 97 Fed. 29 (D. C. N. Y.). See *ante*, § 2647.

But see *In re Olansky*, 20 A. B. R. 780, 163 Fed. 428 (D. C. N. Y.), wherein the court refused the discharge for concealment of assets but without prejudice to a renewal of the application for a discharge in case pending litigation concerning the same transaction result favorably to the bankrupts!

^{26.} *In re Gross*, 5 A. B. R. 271 (Ref. N. Y., affirmed by D. C.).

SUBDIVISION "D."

COSTS ON DISCHARGE.

§ 2658. **Costs on Discharge.**—Costs may be awarded on discharge.²⁷ But costs incurred in opposing the bankrupt's discharge do not grow out of the administration of the estate; and where such costs are incurred by certain creditors, without the consent of the creditors generally, and without benefit to the estate, they will not be taxed against the estate, even though the opposition was successful.²⁸

§ 2659. **Power to Award Costs Inherent.**—Power to award costs in discharge proceedings is inherent.²⁹

§ 2660. **Referee Allowed Compensation as Special Master on Discharge.**—The special master may be allowed a reasonable compensation.³⁰ And if the referee acts as special master, he may be allowed compensation therefor, the same as any other special master.³¹

Fellows v. Freudenthal, 4 A. B. R. 490, 102 Fed. 731 (C. C. A. Ills.): "In reference to the remaining assignment of error, the award of taxable costs against the objecting creditors was authorized by subdivision 18 of § 2 of the Bankruptcy Act, and the allowance of \$25 as costs of the referee on the hearing is the only debatable question. Section 40 of the act expressly provides that 'referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case,' together with a small percentage on payments out of the estate. This provision is in harmony with the purpose manifested throughout the act, to so limit all allowances as to secure economical administration of proceedings and estates in bankruptcy; and the duty of the courts to construe and administer the act in conformity with that purpose is well declared and exemplified in the opinion of Jenkins, Circuit Judge, speaking for this court, in the recent case of *In re Curtis* (4 Am. B. R. 17), 100 Fed. 784. If the charge in question is for services rendered by the referee in the performance of the duties of a referee under the act, it is plainly not taxable as costs in this instance; for, however inadequate the prescribed compensation may be, he takes the office cum onere, and must abide by the fees so fixed. In §§ 38 and 39 the jurisdiction and duties of referees are specifically enumerated, but the matter of hearing applications for a discharge is not included, either in direct terms or inferentially, while subdivision 4 of § 38 clearly excepts

27. Bankr. Act, § 2 (18): "Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."

28. *In re Kyte*, 26 A. B. R. 507, 189 Fed. 531 (D. C. Pa.). Compare ante, § 2060½.

29. *In re Wolpert*, 1 A. B. R. 436 (Special Master N. Y.); [1867] *In re George*, Fed. Cases 5,326; [1867] *In re Holgate*, Fed. Cases 6,601; [1841] *In*

re Guild, Fed. Cases 5,860; *State of Pennsylvania v. W. & B. Bridge Co.*, 18 How. 460; *In re Miers*, 27 A. B. R. 879, 193 Fed. 288 (D. C. S. D.).

30. *In re Gillardon*, 26 A. B. R. 103, 187 Fed. 289 (D. C. Pa.).

31. *In re Grossman*, 6 A. B. R. 510, 111 Fed. 507 (D. C. Mich.); *In re Bragassa v. St. Louis Cycle Co.*, 5 A. B. R. 700, 107 Fed. 77 (C. C. A. Tex.); *Contra*, *In re Troth*, 4 A. B. R. 780, 104 Fed. 291 (D. C. Ohio). See § 2011; also, see *contra*, *In re Wilcox*, 19 A. B. R. 241, 156 Fed. 685 (D. C. Mich.).

such hearings from his jurisdiction. Moreover, § 14b expressly provides that 'the judge shall hear the applications for a discharge, and such proofs and pleas as may be made in opposition thereto.' As the District Courts are invested with jurisdiction both at law and in equity, to 'enable them to exercise original jurisdiction in bankruptcy proceedings' (§ 2), the power unquestionably exists to order a reference for the purpose of the hearing pursuant to the equity practice; and it would be practically impossible to conduct the hearings otherwise in districts like the Northern District of Illinois, with the press of other business, and cases in bankruptcy under the present act numbering in the thousands. The reference is then made to the referee in the capacity of special master, not as referee in bankruptcy, and for a duty independent of the latter office, and in no sense incompatible. * * * For the necessary service so performed under the order of reference, the appointee is entitled to a reasonable allowance, unaffected by the fact that he held as well the office of referee in bankruptcy, and was probably chosen for that reason."

§ 2661. Awarding Costs against Creditors.—Costs of discharge may be awarded against the creditors on discharge, where unsuccessful.³² Even if successful, yet the costs may be taxed against the objecting creditors, and they be given a judgment over against the bankrupt therefor.

But it has been held improper to charge a fee for the bankrupt's attorney against the objecting creditor.³³

Costs of appeal by creditors upon an unsuccessful opposition to discharge have sometimes been awarded against the bankrupt, notwithstanding he has prevailed in the litigation.³⁴

³². In re Wolpert, 1 A. B. R. 436 (Special Master N. Y.). Compare, also, In re Fritz, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

³³. In re Gillardon, 26 A. B. R. 103, 187 Fed. 289 [D. C. Pa.].

³⁴. In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

CHAPTER LIII.

EFFECT OF DISCHARGE ON THE RIGHTS OF THE PARTIES.

Synopsis of Chapter.

DIVISION 1.

- § 2662. Right to Discharge and Effect of Discharge Distinct Matters.
- § 2663. Effect of Discharge on Particular Debt to Be Determined When Enforcement of Debt Attempted.
- § 2664. Decree of Discharge to Be General.
- § 2665. No Limiting of Effect, nor Excepting of Particular Debts, in Decree.
- § 2666. Except Where Former Discharge Refused.
- § 2667. Urging Debt to Be Not "Provable" or to Be within Exceptions of § 17. Not "Collateral Attack."
- § 2668. Discharge Bars Debts, Not Enforcement of Liens or Title to Property.
- § 2668½. Nor Does It Prevent Trustee Pursuing Bankrupt for Assets.
- § 2669. Bankrupt Remains Liable on Debts Not Dischargeable, Collectible Out of Subsequently-Acquired Assets.
- § 2670. Nondischargeable Debts, if "Provable," Share in Dividends.
- § 2671. Secondary Liability, Unaffected.
- § 2672. Debt Not Extinguished, but Its Enforcement Barred.
- § 2673. Valid Liens Not Cast Off, nor Their Enforcement Prevented.
- § 2674. Transactions, Themselves, Not Invalidated because of Being Bars to Discharge.
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- § 2767. Debts Intentionally Scheduled in Name of Original Payee When Held by Third Person.
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- § 2777. Actual Knowledge by Creditor Cures Defective Scheduling.
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- § 2785. "Fiduciary Capacity" Refers to Express Trusts; and Excludes Conversions by Agents, etc., Also Fraudulent Transfers.
- § 2786. "Fiduciary" Relation Must Exist Independently of Transaction in Which Debt Arose.
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DIVISION 6.

SUBDIVISION "A."

§ 2791. Partnerships Entitled to Discharge.

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§ 2793. Act of One Bars Firm Discharge if Done within Scope of Partnership Business.

SUBDIVISION "B."

§ 2794. Discharge of Firm Debts in Individual Bankruptcy of Member.

§ 2795. Individual Liability for Firm Debts, Discharged if Firm Debts "Duly" Scheduled in Individual Bankruptcy, Irrespective of "Firm Assets," etc.

§ 2796. Firm Debts Provable Debts of Each Member, and So Far as Affect Individual, Are Discharged by Individual's Discharge.

§ 2797. But Partnership Debts to Be "Duly Scheduled," Else Not Affected by Individual Discharge.

§ 2798. And Notices to Creditors Must Give Notice of Firm Debts and That Discharge Therefrom Sought.

§ 2799. Petitions for Adjudication and Discharge Each to Mention Firm Debts and Pray for Discharge Therefrom.

§ 2800. And Firm Property to Be Described.

§ 2801. Amendment to Include Discharge from Firm Debts, Where Already Duly Scheduled.

§ 2802. Even after Term at Which Discharge Granted.

SUBDIVISION "C."

§ 2803. Where Individuals Adjudged Bankrupt with Partnership, Individual Debts Discharged.

§ 2804. Where Not So Adjudged, Individual Debts Not Discharged.

SUBDIVISION "D."

§ 2805. Individual Partner May Be Discharged, Where Firm and Other Partners Not.

DIVISION 1.

NATURE AND EFFECT OF DISCHARGE IN GENERAL.

§ 2662. Right to Discharge and Effect of Discharge Distinct Matters.—The right to a discharge and the effect of a discharge are entirely distinct matters.¹

Friend v. Talcott, 228 U. S. 27, 30 A. B. R. 31: "In view of the text of the Bankruptcy Law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge, it needs but statement to demonstrate the difference of cause which

1. See ante, § 2468, et seq. In re McCarty, 7 A. B. R. 40, 111 Fed. 151 (D. C. Ills.), quoted post, § 2663; In re Rhutassel, 2 A. B. R. 697, 96 Fed. 597 (D. C. Iowa), quoted post, § 2663; *obiter*, In re Carmichael, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa); In re

Marshall Paper Co., 4 A. B. R. 468, 102 Fed. 872 (C. C. A. Mass.); In re Lieber, 3 A. B. R. 217 (Special Master Pa.); impliedly, In re Tinker, 3 A. B. R. 580, 99 Fed. 79 (D. C. N. Y.); inferentially, In re Gara, 26 A. B. R., 573, 190 Fed. 112 (D. C. Pa.).

necessarily obtains between determining, on the one hand, in favor of the bankrupt, whether he is entitled to a general discharge, and of deciding, on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge, and the question after it is granted, whether a particular debt is exempted by law from its operation—than does the provisions of the statute (§ 14c) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge.'” [Quoted further at §§ 2750½, 2750¾.]

Schiller v. Weinstein, 15 A. B. R. 183, 47 N. Y. Misc. 622: “By this determination (holding the particular debt in question to be excepted under § 17) ‘The validity and effectiveness of the discharge in general are not questioned,’ only ‘it does not extend to this particular claim.’” *Sutherland v. Lasher*, 11 A. B. R. 780.”

In *re Mussey*, 3 A. B. R. 592, 99 Fed. 71 (D. C. Mass.): “She has now applied for her discharge in bankruptcy, and certain creditors who proved their claims in the insolvency proceedings ask that the discharge granted her shall expressly exempt from its operation all claims proved in insolvency, or within the jurisdiction of the insolvency court, and also such claims as were created by her fraud. It was held in *In re Rhutassel* (D. C.), 96 Fed. 597 (2 Am. B. R. 697), that the only issue tendered by the petition for a discharge is the right to the discharge, and that the only facts properly pleadable in opposition thereto are those which show that the bankrupt is entitled to no discharge whatsoever. ‘The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim, and the debtor pleads his discharge in bar thereof. See, also, *In re Thomas* (D. C.), 92 Fed. 912 (1 Am. B. R. 515). The discretion of this court cannot determine the effect of a discharge in bankruptcy upon debts proved in insolvency. These debts are either barred by the discharge as matter of law, or else, as matter of law, remain unaffected thereby. The question of law is raised upon the creditors’ suit to enforce these debts more conveniently than upon the petition for discharge, and so it is more convenient that the discharge shall be in the usual form, and that its scope shall be left for future determination.”

In *re Thomas*, 1 A. B. R. 515, 92 Fed. 912 (D. C. Iowa): “That the debt was created by fraud of the bankrupt, if such be the case, is not a ground for refusal of discharge under the statute. Section 17 provides that from debts so created a discharge does not release the bankrupt. And, when the discharge is pleaded as a defense to the enforcement of such debt, proof that the debt was so created makes the discharge inoperative against it. But the statute does not justify withholding the discharge therefore.”

Katzenstein v. Reid, 16 A. B. R. 746, 41 Tex. Civ. App. 106: “These two sections should undoubtedly be construed together, as argued by appellant, and, following that plan of construction, we arrive at the conclusion that the two sections are perfectly harmonious; § 14 providing for the discharge of a bankrupt, unless it should appear that certain acts have been done by him, and § 17 setting forth the debts from which the bankrupt shall be released by such discharge. Each bears upon a different subject; the one relating to the discharge, the other to the debts from which such discharge will relieve the debtor. The matters and things which will prevent a discharge in bankruptcy are different from those set out in the section which will not relieve from liability in case

there is a discharge of the bankrupt. The bankrupt may be discharged and still be held liable for the classes of debts mentioned in amended § 17 of the act of 1903; and in seeking to hold a party liable, who has been discharged in bankruptcy, the ground for such liability must be found in § 17, and not in § 14, which enumerates grounds upon which a discharge shall be refused."

Frank v. Michigan Paper Co., 24 A. B. R. 261, 179 Fed. 776 (C. C. A. Md.): "In this connection it becomes important to distinguish between the right to a discharge and the effect of a discharge in bankruptcy. With regard to the latter, we think it clear from the language quoted from § 17 of the present Bankruptcy Act as amended in 1903, that a false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners to the extent of holding them civilly liable for the debt and their discharge in bankruptcy will not discharge their liability as to such debt. * * * As applied to partnership debts these questions ought to be considered in connection with the fact that under the present Bankruptcy Act a partnership is a 'legal entity,' consequently a materially false statement made in writing by one of the partners (without the knowledge of the others) for the purpose of obtaining credit on behalf of the partnership, and by means of which such credit is obtained, is (1) the act of the individual partner making it, and (2) the act of the legal entity called the 'partnership,' and, hence, both the partner making such statement and the legal entity called the 'partnership' are chargeable with having done one of the acts, the doing of which will, upon objection being properly made, prevent the granting of a discharge under § 14b Bankruptcy Act, 1898, as amended in 1903; and it follows that any 'party in interest' can successfully oppose the discharge of the acting partner and of the 'partnership.' Taking the view that the right to a discharge is determined by the good faith of the bankrupt, and that the effect of such discharge, is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents, we come to the conclusion that the court below erred in refusing to grant a discharge to the bankrupt." Quoted further at § 2563.

§ 2663. Effect of Discharge on Particular Debt to Be Determined When Enforcement of Debt Attempted.—The effect of the discharge on the rights of the parties is in general to be determined when the debt is thereafter sought to be enforced by legal proceedings.²

In re Marshall Paper Co., 4 A. B. R. 468, 102 Fed. 872 (C. C. A. Mass., revers-

2. See ante, §§ 2468, 2469, and post, § 2794. *In re Mussey*, 3 A. B. R. 592, 99 Fed. 71 (D. C. Mass.), quoted ante, § 2662; *In re Frank*, 6 A. B. R. 156 (D. C. Penn.); *In re Thomas*, 1 A. B. R. 515, 92 Fed. 912 (D. C. Iowa), quoted ante, § 2662; *In re Carmichael*, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa); [1867] *In re Elliott*, 2 N. B. Reg. 110, Fed. Cases 4,391; [1867] *In re Rathbone*, 1 N. B. Reg. 324, Fed. Cases 11,580; [1867] *In re Rosenfield*, 1 N. B. Reg. 575, Fed. Cases 12,058; [1867] *In re Wright*, 2 N. B. Reg. 41, Fed. Cases 18,070; [1867] *In re Stokes*, 2 N. B. Reg. 212, Fed. Cases 13,476; [1867] *In re Tracy*, 2 N. B. Reg. 298, Fed. Cases 14,124; [1841]

Chapman v. Forsyth, 2 How. 202. *Contra*, *In re Meyers*, 2 A. B. R. 707, 96 Fed. 408 (D. C. N. Y.).

In New York the Surrogate's Court in settling the final account of an administrator, can disallow claims against the estate on judgments subsequently discharged in bankruptcy, which, however, have not been "canceled" of record in accordance with the special statute on the subject. In re Peterson, 24 A. B. R. 270, 137 App. Div. N. Y. 435, affirming 22 A. B. R. 549. See also, ante, § 2707.

General Principles of Res Judicata as Applied to Discharge.—*Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills.), affirmed on other

ing 2 A. B. R. 653): "The right to a discharge and the effect of a discharge, are wholly distinct propositions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge."

Hellman v. Goldstone, 20 A. B. R. 539, 161 Fed. 193 (C. C. A. N. J.): "We are of opinion the court below was right. The question whether a judgment against one who is hereafter adjudged bankrupt is thereby discharged is properly raised by pleading the discharge in a proceeding to enforce the judgment. In *re Wright*, 2 Ben. 509, Fed. Cas. No. 18,065. Presumably the court in which such discharge is thus pleaded will accord it due legal effect, and if it does not the bankrupt's remedy lies in a review of such action by the proper appellate tribunal, or ultimately in the Federal court for denial to him of a right under a law of the United States. *Dimock v. Revere Copper Company*, 117 U. S. 565."

In *re McCarty*, 7 A. B. R. 41, 111 Fed. 151 (D. C. Ills.): "The effect of such discharge if in the future it shall be pleaded in bar of the collection of the claim in question will arise in the proper tribunal where such collection is sought to be enforced. * * *

"The right to a discharge and the effect of a discharge are entirely distinct propositions."

In *re Rhutassel*, 2 A. B. R. 697, 96 Fed. 597 (D. C. Iowa): "The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim, and the debtor pleads his discharge in bar thereof. This question was very fully and carefully considered by Judge Woolson in *In re Thomas*, 92 Fed. 912; and I concur in the conclusion reached by him, that the proper place and time for the determination of the effect of the discharge is when the same is pleaded or relied upon as a defense to the enforcement of the particular claim."

In *re White*, 10 A. B. R. 794 (Ref. Ala.): "The proper time and place to test the question as to whether the bankrupt is discharged from a particular debt or judgment is when the bankrupt may be sued upon the debt, or process may be issued upon the judgment in the court which rendered the same, subsequent to the discharge of the bankrupt. If the discharge is there interposed as a defense by the bankrupt, it is for that court to determine whether that particular debt is affected by the discharge so pleaded."

And injunction will be refused.³

Consequently, it is generally in the state court that the question arises; thus, a surrogate may determine whether a judgment was released by a testator's discharge in bankruptcy.⁴

The dischargeability of the particular debt involved is, however, to be determined by the law as it stood when the discharge was granted, not as it stood when it is sought to enforce the debt.

grounds sub nom. *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31, quoted at § 2662.

In *re Halper*, 31 A. B. R. 283 (N. Y. City Ct.); *Hanan v. Long*, 32 A. B. R. 132, 134 N. Y. Supp. 786, 150 App. Div. 327.

3. *Hellman v. Goldstone*, 20 A. B. R. 539, 161 Fed. 139 (C. C. A. N. J.).

4. In *re William's Estate*, 23 A. B. R. 394, 118 N. Y. Supp. 562, reversed on other points in *In re Williams*, 31 A. B. R. 717, 208 N. Y. 32.

§ 2664. Decree of Discharge to Be General.—The decree of discharge should be general, and should not attempt to limit its own effect by excepting particular debts excepted by statute from the operation of discharge; but where the right itself to a discharge has already been denied in a former bankruptcy, the discharge decree may except the old debts, because of *res judicata*.⁵

§ 2665. No Limiting of Effect, nor Excepting of Particular Debts, in Decree.—In some reported cases, the bankruptcy court, in granting a discharge, uses language indicating that it considers it to be within the court's function, when the discharge is granted, to limit or qualify its effect.⁶

Notably is this so in regard to individual bankruptcies where the individual bankrupt is also a member of a partnership, the courts sometimes attempting to qualify the order of discharge by limiting it to individual debts.⁷ However, in general, the bankruptcy court in granting a discharge should not attempt to limit the effect of the discharge, the sole function of the court being to grant or refuse the discharge, the law itself then fixing the extent and effect of the discharge.⁸ Thus, in cases of individual bankruptcies, the discharge should be, in the words of the form of the order, "from all provable debts excepting those excepted" by the statute. If, then, the statute does not except partnership debts, the court should not attempt to do so.

§ 2666. Except Where Former Discharge Refused.—Nevertheless, where it is not the effect of a discharge on a particular debt that is involved, but rather the right itself to a discharge, and where such right exists as to some creditors and not as to others, as in cases of former denial of discharge, the court undoubtedly may give effect to the *res adjudicata* by excepting debts provable under the former bankruptcy.⁹

In *re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.): "The cases cited by the bankrupt, and referred to, *supra*, hold simply that if a debt is not

5. See post, § 2794.

6. In *re Claff*, 7 A. B. R. 128, 111 Fed. 506 (D. C. Mass.), quoted ante, § 2438; In *re Feigenbaum*, 9 A. B. R. 595, 121 Fed. 69 (C. C. A. N. Y.); In *re Royal*, 7 A. B. R. 636, 113 Fed. 140 (D. C. N. Car.); In *re Carmichael*, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa); In *re Blumberg*, 1 A. B. R. 627, 94 Fed. 476 (Ref. Tenn., reversed in 1 A. B. R. 633.).

7. In *re Carmichael*, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa). See post, § 2794.

8. In *re Tinker*, 3 A. B. R. 580, 99 Fed. 79 (D. C. N. Y.); In *re Blumberg*, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn., reversing 1 A. B. R. 627); In *re Mussey*, 3 A. B. R. 592, 99 Fed. 71 (D. C. Mass.).

Withholding Discharge until Compliance with Rules.—Yet, of course, it is always within the discretion of the court to refuse to grant a discharge until the bankrupt's schedules are properly prepared and to this extent the court can, at any rate, compel the insertion of the names of the firm creditors and full descriptions and withhold action on the petition for discharge until the requirement is complied with. See ante, § 2480.

9. See ante, § 2437. And see In *re Elby*, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa); In *re Kuffler*, 22 A. B. R. 289, 168 Fed. 1021 (C. C. A. N. Y., affirming In *re Kuffler*, 19 A. B. R. 181, 153 Fed. 667).

provable (that is, not such a debt as can be discharged) that fact is to be determined when the discharge is set up as a defense to their enforcement, and not upon the application for the discharge itself. But these cases are not authority for the proposition that provable debts, not intended to be discharged, should not be specifically excepted from the order of discharge."

Impliedly, *Bluthenthal v. Jones*, 208 U. S. 64, 19 A. B. R. 288: "There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. * * * An objecting creditor might have proved upon that application (for discharge) that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it." Quoted further at § 1438.

Otherwise, such debts, being likewise provable under the present bankruptcy, would be discharged by the present discharge, and the former adjudication be defeated.¹⁰

§ 2667. Urging Debt to Be Not "Provable" or to Be within Exceptions of § 17, Not "Collateral Attack."—Avoiding the effect of the discharge by urging that the claim is not a "provable" debt, or that it comes within some of the exceptions of § 17, is not a collateral attack on the discharge decree.¹¹

Sutherland v. Lasher, 11 A. B. R. 780, 41 N. Y. Misc. 251, affirmed 87 App. Div. 663: "On behalf of the motion it is further urged that the discharge in bankruptcy cannot be collaterally attacked in this proceeding. No such attempt is made by the plaintiff. The validity and effectiveness of the discharge in general are not questioned, the only point raised being that it does not extend to this particular claim for the reasons above mentioned."

Nor is it a direct attack upon the decree, nor an attack upon it of any kind; but is rather a carrying out of its very terms, for by the law itself and the terms of the decree, the discharge is to operate only upon claims that are provable and not excepted by § 17.

10. See ante, §§ 2437, 2438; post, § 2680; *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, quoted at § 2438; impliedly, *In re Kuffer*, 18 A. B. R. 17, 151 Fed. 12 (C. C. A. N. Y.). And compare, *In re Bramlett*, 20 A. B. R. 402, 161 Fed. 588 (D. C. Ga.), where

the subsequent discharge was refused in toto, although it might be inferred that all the debts were the same.

11. *Schiller v. Weinstein*, 15 A. B. R. 184, 47 N. Y. Misc. 622, quoted post, § 2781.

§ 2668. Discharge Bars Debts, Not Enforcement of Liens or Title to Property.—In actions to try the title to property, or to determine the validity of liens on property, or interests therein, where no recovery of a debt is sought, the defendant may not interpose his discharge in bankruptcy—discharge bars debts, not ownership of property, whether such ownership be absolute, conditional or by way of lien, whether it be ownership of the whole or merely partial ownership.¹²

Birmingham Fertilizer Co. v. Cox & Son, 28 A. B. R. 934, 10 Ga. Ct. App. 699: "In an action of trover, the issue is one of title, not of debt. Consequently, neither the defendant in such an action, wherein bail is required, nor the surety on his bond, can set up as a defense the discharge of the defendant in bankruptcy pending the action. This is true, although the plaintiff elects to take a money verdict for the damages alleged to have been sustained."

The discharge bars all future legal proceedings for the enforcement of the debt or obligation discharged, except such as are by way of enforcement of a lien therefor not itself invalid; but does not affect suits to determine the ownership of property or to enforce liens thereon.¹³

Berry v. Jackson, 8 A. B. R. 485, 41 S. E. 698, 115 Ga. 196: "The sole issue in the trial of an action of trover is that of title to the property in dispute, and the fact that the plaintiff may elect to take a money verdict in lieu of the specific personalty claimed can in no event alter that issue. *Campbell v. Trunnell*, 67 Ga. 518. Counsel for the plaintiff in error proceeds in his brief upon the assumption that the action was based upon a debt owed by Berry to Jackson, and argues that as such it was a claim from which he was relieved by his discharge in bankruptcy. But no such facts appear in the record. All that we have before us is an action of trover for the recovery of specific personal property, and, regardless of the election of the plaintiff to take a money verdict, the title to the property in dispute, which was the only issue for determination, could not be affected by any bankruptcy proceedings in which the defendant may have participated."

Bank of Commerce v. Elliott, 6 A. B. R. 415, 109 Wis. 648: "Whether the court erred in refusing to give appellant judgment in form against Elliott obviously depends upon whether, after the discharge in bankruptcy, and the entry of the plea by Elliott in bar of further prosecution of the main suit as to him, appellant had a cause of action in any sense upon which a judgment could be rendered. It is conceded that if a defendant is discharged in bankruptcy from a debt, pending proceedings to enforce it, he is entitled to plead such circumstances in bar of further proceedings for a personal judgment, if

12. *Powers Dry Goods Co. v. Nelson*, 7 A. B. R. 506, 10 N. Dak. 580, quoted post, § 2673. *Smith v. Zachry*, 8 A. B. R. 240, 115 Ga. 722; *Bassett v. Thackara*, 16 A. B. R. 786, 72 N. J. L. 81, 60 Atl. 39, quoted post, § 2673. Compare, dissenting opinion, *In re Adler*, 16 A. B. R. 414, 144 Fed. 659 (C. C. A. N. Y.). Compare post, "Stay Only Protects Bankrupt from Judgment in Personam—Judgments in Rem as to Property Unaffected," § 2709.

Olsen v. Nelson, 32 A. B. R. 297, — Minn. —; *McDonald v. Taylor & Co.*, 26 A. B. R. 635, 144 N. Y. App. Div. 329; (1867) impliedly, *Upshur v. Briscoe*, 138 U. S. 378; *Citizens Loan Ass'n v. Boston & Me. R. R.*, 19 A. B. R. 650, 196 Mass. 528, quoted at § 451. Compare ante, § 451; post, § 2673.

13. *Realty Co. v. Gioshio*, 27 A. B. R. 58 (Com. Pleas Pa.).

the plaintiff does not voluntarily discontinue the action, and to recover on such plea. But it is said that if an action is wholly in rem, or partly in rem and partly in personam, its status as an action to reach the res is not disturbed by a discharge of the defendant in bankruptcy, if the plaintiff's interest therein be preserved by the bankruptcy Act. The authorities seem to be uniform to that effect."

Evans v. Rounsaville, 8 A. B. R. 236, 115 Ga. 684: "While a discharge in bankruptcy releases the bankrupt from a debt which is provable under the Bankrupt Act of 1898, and which is not within the excepted classes, and takes away from the creditor the right to proceed against his debtor in personam to recover that debt, yet a valid lien created on the property of the bankrupt more than four months before the filing of his petition in bankruptcy is not affected by his discharge. After discharge, a creditor holding such a lien, who has not proved his debt in bankruptcy, may proceed to enforce it against the property of the bankrupt in the State court."

Paxton v. Scott, 10 A. B. R. 81, 92 N. W. 611, 66 Neb. 385: "If the creditor have an attachment or other lien, he may have a special judgment entered in rem."

In re Blumberg, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.): "So far as creditors of Blumberg may have acquired a lien upon property by attachment levied more than four months before the petition was filed, it is not affected by the discharge; and the right to proceed to subject any property validly attached by levy cannot be questioned, and if the creditors can satisfy their debt in that method, their right to do so is clear, and is not in the least affected by this proceeding. It is only the debt, with the right to proceed against Blumberg in personam, that is discharged."

In re Lineberry, 25 A. B. R. 164, 183 Fed. 338 (D. C. Ala.): "The bankruptcy law does not continue a dischargeable debt for the purpose of permitting a lien to be created after the adjudication, but only to preserve and enforce a lien in existence at the date of the adjudication."

Thus, the debtor's discharge is personal and not in rem and is no bar to the enforcement of a creditor's suit to set aside a fraudulent transfer where such suit is started more than four months before the filing of the bankruptcy petition.¹⁴

Flint v. Chaloupka, 18 A. B. R. 293, 78 Neb. 594: "Cases directly in point are few, but the weight of authority, we believe, and the rule more in harmony with justice, will not permit a fraudulent grantee to plead the subsequent discharge of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding. * * * In *Lowry v. Morrison*, 11 Paige, 327, it is held: 'Where a judgment creditor's suit is commenced before a decree in bankruptcy against the defendant therein, so as to obtain a lien upon his property, and the defendant subsequently obtains his discharge under the Bankruptcy Act, he cannot plead such discharge in bar of the suit generally, as the discharge is only a bar to a personal decree against the bankrupt.'"

It bars efforts to obtain a lien not yet actually acquired, by barring the debt.^{14a}

14. Compare *Blick v. Nimmo*, 30 A. B. R. 770, 121 Md. 139.

14a. *Boggs v. Dunn*, 26 A. B. R. 846, 160 Cal. 283.

§ 2668½. Nor Does It Prevent Trustee Pursuing Bankrupt for Assets.—Nor will discharge prevent the trustee from pursuing the bankrupt for assets belonging to the estate.

In *re Wright*, 24 A. B. R. 437, 177 Fed. 578 (D. C. N. Y.): "In the interest of creditors, it is his duty to follow the assets of the bankrupt estate wherever they may be found, even though the right to recover is closed to him in this proceeding to revoke the discharge."

§ 2669. Bankrupt Remains Liable on Debts Not Dischargeable, Collectible Out of Subsequently-Acquired Assets.—The bankrupt remains liable on debts that are not dischargeable, and they may be collected out of his subsequently-acquired estate.

Katzenstein v. Reid, 16 A. B. R. 749, 41 Tex. Civ. App. 106 : "The statute as to debts not released by the discharge in bankruptcy does not confine itself to the debts of those only who have not accepted the benefits of the dividends paid by the bankrupt court, but it is sweeping in its provisions, and makes no exception of any who may hold the character of debts mentioned. * * *

"The statute does not condition the right of a creditor to sue and establish his claim against a discharged bankrupt on the fact that he did not prove up his claim before the referee, and receive dividends, but it declares that certain debts are not released by the discharge, and the doing of those things will not estop him from prosecuting his suit."

§ 2670. Nondischargeable Debts, if "Provable," Share in Dividends.—Such of the nondischargeable debts as are "provable" may be allowed to share in dividends. Because they are not dischargeable does not imply they are not "provable," although the converse is not true, for debts that are not provable are not dischargeable.¹⁵

§ 2671. Secondary Liability, Unaffected.—Discharge does not affect secondary liability.¹⁶

§ 2672. Debt Not Extinguished but Its Enforcement Barred.—Discharge is not a payment nor extinguishment of debts; it is simply a bar to their enforcement by legal proceedings.

Evans v. Staalle, 11 A. B. R. 184, 88 Minn. 253: "The discharge in bankruptcy did not pay or extinguish the plaintiff's debt, nor relieve the defendant's land from the trust with which it was charged by operation of law for the payment of the debt."

Citizens Loan Ass'n v. Boston & Maine R. R., 19 A. B. R. 650, 196 Mass. 528: "A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end. The obligation itself is not canceled. *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Heather v. Webb*, 19 Eng. Rep. 277, 2 Com. Pl. Div. 1."

15. *Obiter*, *Katzenstein v. Reid*, 16 A. B. R. 749, 41 Tex. Civ. App. 106.

16. See ante, "Rights of Creditors against Third Parties Liable Jointly with the Bankrupt or Secondarily for Him," § 1510, et seq.

Butterick Pub. Co. v. Bowen Co., 26 A. B. R. 718, 33 R. I. 40; *Schunack v. Art Medal Nov. Co.*, 26 A. B. R. 731, 84 Conn. 331; *Brown Coal Co. v. Autezak*, 25 A. B. R. 898, 164 Mich. 110.

§ 2673. Valid Liens Not Cast Off nor Their Enforcement Prevented.—The discharge does not operate to cast off good and valid liens given or acquired for the debts, either liens by contract or by legal proceedings, nor to prevent their enforcement. It is purely personal to the bankrupt.¹⁷

Evans v. Staalle, 11 A. B. R. 184, 88 Minn. 253: "The only effect of the discharge was to relieve the debtor from all legal obligations to pay the debt, leaving all liens or trust securing the debt unimpaired. *Lowell, Bankr.*, §§ 242-244; *Smith v. Stanchfield*, 84 Minn. 343, 7 Am. B. R. 498. Now, when the land in this case was conveyed to the defendant upon a consideration paid by the debtor a trust in favor of the plaintiff as a creditor attached to the land to the extent necessary to satisfy his debt, which could be defeated only by disproving any fraudulent intent. This trust could be enforced after the debtor's discharge, although all personal remedies against him to secure payment of the debt had been thereby extinguished, precisely the same as a mortgagee may foreclose his lien on the mortgaged premises, and thereby secure payment of his debt, although an action to recover it from the mortgagor be barred by the statute of limitations. *Slingerland v. Sherer*, 46 Minn. 422."

Powers Dry Goods Co. v. Nelson, 7 A. B. R. 510, 10 N. Dak. 580: "It is conceded that if a defendant is discharged in bankruptcy from a debt, pending proceedings to enforce it, he is entitled to plead such circumstances in bar of further proceedings for a personal judgment, if the plaintiff does not voluntarily discontinue the action, and to recover on such plea. But it is said that if an action is wholly in rem, or partly in rem and partly in personam, its status as an action to reach the res is not disturbed by a discharge of the defendant in bankruptcy, if the plaintiff's interest therein be preserved by the Bankrupt Act. The authorities seem to be uniform to that effect."

Paxton v. Scott, 10 A. B. R. 80, 66 Neb. 385, 92 N. W. 611: "The effect of the discharge is personal to the bankrupt, and it does not affect any lawful lien, charge, or incumbrance existing on his property, but judgment may be specially entered thereon in rem. * * * The discharge of the bankrupt does not affect securities, and they are subject to a judgment or decree in rem, but the creditor applying for such remedy may be required to await the result of the bankrupt's discharge if the bankrupt or assignee insists upon it. * * * The Bankruptcy Law was carefully designed to save all liens against property from being affected by the discharge, and its terms seem ample for that purpose."

Bassett v. Thackara, 16 A. B. R. 786, 72 N. J. L. 81, 60 Atl. 39: "Undoubtedly this discharge released McGeorge from further personal liability to pay the judgment, but it did not affect the security afforded by the levy."

Philmon v. Marshall, 11 A. B. R. 180, 116 Ga. 811: "This court has twice held that a discharge in bankruptcy under the Bankrupt Act of 1898 does not affect the lien of a creditor who does not prove his debt in the bankruptcy

17. See ante, §§ 451, 2668; also *Malin v. Wenham*, 13 A. B. R. 210, 209 Ills. 252. But see *Wenham v. Mallin*, 103 Ills. App. 609; *Evans v. Rounsaville*, 8 A. B. R. 236, 115 Ga. 684; *Smith v. Zachry*, 8 A. B. R. 240, 115 Ga. 722; *Howard v. Gunliff*, 10 A. B. R. 71, 69 S. W. 737.

Flint v. Chaloupka, 18 A. B. R. 293, 78 Neb. 594, quoted at §§ 766, 2668.

Thus, there will be no stay of foreclosure suits, to permit interposition of discharge. *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.).

Olsen v. Nelson, 32 A. B. R. 297, — Minn. —; *Johnson v. Norris*, 27 A. B. R. 107, 190 Fed. 459 (C. C. A. Tex.); *Blick v. Nimmo*, 30 A. B. R. 770, 121 Md. 139.

court where the lien was created more than four months before the petition in bankruptcy was filed. *Evans v. Rounsaville*, 8 A. B. R. 236, 115 Ga. 684; * * * *Smith v. Zachry*, 8 A. B. R. 240, 115 Ga. 722." It will be observed that the court in this case introduces another element, which has no bearing, however, on the matter. It qualifies its rule by saying "Where the creditor has not proved his claim in bankruptcy." The proving of the claim would have nothing to do with the validity or invalidity of the lien.

Bank of Commerce v. Elliott, 6 A. B. R. 415, 109 Wis. 648: "It is conceded that if a defendant is discharged in bankruptcy from a debt, pending proceedings to enforce it, he is entitled to plead such circumstances in bar of further proceedings for a personal judgment, if the plaintiff does not voluntarily discontinue the action, and to recover on such plea. But it is said that if an action is wholly in rem, or partly in rem and partly in personam, its status as an action to reach the res is not disturbed by a discharge of the defendant in bankruptcy, if the plaintiff's interest therein be preserved by the Bankruptcy Act."

§ 2674. Transactions, Themselves, Not Invalidated because of Being Bars to Discharge.—The statute as to discharge does not set aside or otherwise affect any transaction, nor affect the recovery of property by the trustee; nor does the granting of a discharge do so.¹⁸

§ 2675. Contractual Relations Not Dissolved, unless Mergeable in "Provable" Debt at Time of Bankruptcy.—Contractual relations are not in and of themselves dissolved by the discharge. Discharge bars only "provable" "debts, demands or claims;" therefore, a mere contractual relation, not merged into a debt, demand or claim that could be "proved" at the time of bankruptcy, is not affected. Hence, contracts for liens, if in no form they could be "proved," as "debts, demands or claims" in the bankruptcy proceedings, would not be discharged, bankruptcy discharging only such obligations as could be framed into provable debts.¹⁹

§ 2676. Contracts for Liens on After-Acquired Property Discharged, if Mergeable in Provable Debts at Time of Bankruptcy.—A contract for a lien on future-acquired property, where such property is not acquired until after adjudication, is discharged, if discharge be eventually granted, if such contract could have been sued on at the time of bankruptcy as having become merged in a right of action for breach of contract; for such right of action is a provable debt and hence is discharged. And the bankrupt, of course, would be entitled to have the action stayed until his petition for discharge could be passed upon.²⁰

§ 2677. But Where Lien Exists in Presenti before Bankruptcy, Though Property Acquired Afterward, Discharge No Bar.—Where, however, the law holds that a lien exists in presenti, before bankruptcy,

18. *Howard v. Cunliff*, 10 A. B. R. 71, 69 S. W. 737; *In re Scott*, 11 A. B. R. 327, 126 Fed. 981 (D. C. Del.).

19. Compare discussion as to whether or not contractual relations

are dissolved by the adjudication of bankruptcy, ante, §§ 641, 1118.

20. Instance, *In re Lineberry*, 25 A. B. R. 164, 183 Fed. 338 (D. C. Ala.).

notwithstanding the fruits of the property on which the lien exists be not acquired until after adjudication, the discharge will not prevent the enforcement of the lien.

§ 2678. Thus, Assignments of Unearned Wages.—Thus, where it is held, by the state law, that an assignment of unearned wages to secure a debt creates no lien until the wages have been earned, no lien arises if the debtor be ultimately discharged, as to wages earned after the adjudication.²¹

Leitch v. Northern Pac. Ry. Co., 14 A. B. R. 411, 95 Minn. 35: "A solution of this question depends upon the effect of the debtor's discharge in bankruptcy upon the alleged assignment of his wages. Did it release him from the liability of having his wages, earned after his discharge, collected by the plaintiff by virtue of the assignment and applied to the payment of his debt? If the plaintiff had a valid lien at the time of the debtor's discharge upon his wages thereafter to be earned as security for the payment of his debt, then the discharge would not affect such vested security. This conclusion follows from the admitted proposition that a discharge in bankruptcy only relieves the debtor from all legal obligation to pay the debt, and from all liability of having his future-acquired property and earnings seized to pay the debt; but all valid and existing liens on specific property or trusts therein securing the debt are not impaired by the discharge. *Evans v. Staalle*, 88 Minn. 253, 92 N. W. 951. The case cited was one where the creditor at the time the bankruptcy proceedings were initiated had the vested right to enforce a trust in certain land the legal title to which was held by a third party for the payment of his debt against the bankrupt. It was held that the right to enforce the trust was not affected by the debtor's discharge. The decision, however, is not relevant to the question whether the plaintiff herein had a valid lien at the time of his debtor's discharge upon his wages thereafter to be earned. In the case of *Wenham v. Mallin*, 103 Ill. App. 609, relied upon by the plaintiff, it does not appear whether the wages which it was sought to subject to the payment of a debt from which the debtor had been discharged in bankruptcy were earned after such discharge. The decision in that case is based upon the admitted proposition that valid liens on property are not affected by a discharge in bankruptcy, and the statement that the creditor had a vested property right in the wages of his debtor to secure the payment of his debt which was not affected by a discharge in bankruptcy. The case is not strictly in point. The plaintiff also relies upon the decisions of this court sustaining the validity of chattel mortgages on crops to be grown or on property to be acquired. *Minn. Linseed Co. v. Maginis*, 32 Minn. 193, 20 N. W. 85; *Miller v. McCormick Co.*, 35 Minn. 399, 29 N. W. 52; *Ludlum v. Rothschild*, 41 Minn. 218, 43 N. W. 137; *Hogan v. Elevator Co.*, 66 Minn. 344, 69 N. W. 1. Apparently the cases are in point, but not in fact. There is a fundamental distinction between a mortgage on specific crops to be sown or definitely described chattels to be acquired and a mortgage on the future earnings of a debtor—a mere expectancy, depending upon a variety of vague contingencies. Again, there are reasons of public policy which differentiates a mortgage on

21. In *re Lineberry*, 25 A. B. R. 154, 183 Fed. 338 (D. C. Ala.), quoted at § 451; In *re Home Discount Co.*, 17 A. B. R. 180 (D. C. Ala.), quoted ante, § 451. In *re Karns*, 16 A. B. R. 841 (D. C. Ohio). And compare, *Wenham v. Mallin*, 103 Ills. App. 609, and *Mallin*

v. Wenham, 13 A. B. R. 210, 209 Ills. 252. Compare post, § 2736½.

Assignee of Wages, Also Employer, Adverse Claimants, Not to Be Proceeded against Summarily.—See ante, §§ 451, 1678, 1683.

chattels to be acquired and one on wages to be earned. When a necessitous wage earner is compelled to mortgage his future earnings, he mortgages not his chattels, but the means whereby he may live and maintain his family. The State necessarily has an interest in such contracts, and it is contrary to a wise public policy to give effect to them, except to a limited extent. The rule on principle and deducible from the decisions of this court is that an assignment of wages to be earned in the future under an existing contract of employment to secure a present debt or future advances is valid as an agreement, and takes effect as an assignment as the wages are earned, but an assignment of wages to be earned, without limit as to amount or time, are void. *O'Connor v. Meehan*, 47 Minn. 247, 49 N. W. 982; *Steinbach v. Brant*, 79 Minn. 383, 82 N. W. 651, 79 Am. St. Rep. 494; *Baylor v. Butterfass*, 82 Minn. 21, 84 N. W. 640. Tested by this rule, it logically follows that the plaintiff, when the debtor filed his petition in bankruptcy, and when he received his discharge, had no lien on or vested security in the wages of the debtor thereafter to be earned by virtue of his contract, which was to take effect as an assignment when the wages were earned. The plaintiff then had at most a mere expectancy, depending on contingencies. We accordingly hold that the discharge in bankruptcy released the debtor from any liability of having his wages thereafter earned applied in payment of the debt from which he had been discharged."

In *re West*, 11 A. B. R. 782, 128 Fed. 205 (D. C. Ore.): "The theory of a lien upon the earnings of future labor is not that it attaches to such earnings from the moment of contract of pledge or assignment, but from the moment of their existence. It is needless to say that there can be no lien upon what does not exist. A pledge or assignment of future wages under an existing employment is said to create an equitable interest in such wages. *Stott v. Frany*, 20 Or. 410, 23 Am. St. Rep. 132. This is true of wages earned upon a general employment, as well as those earned upon a definite contract. In this case the railroad company was under no obligation to employ the bankrupt, nor he to work for the company. If future earnings in such a case can be said to have a potential existence, they are the subject of an agreement for a lien; but the lien, or the so-called equitable interest, does not attach until the wages come into existence and until the lien does attach there is no lien. The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages after the adjudication became the property of the bankrupt clear of the claims of all creditors. * * * These debts cannot escape the operation of the Bankruptcy Law by an agreement for a lien upon what the debtor expected to earn, but did not earn until after the adjudication of bankruptcy."

But where it is held, by the state law, that the lien is a lien upon the contract of employment, the wages simply being incident thereto and arising therefrom, then the lien, being in existence before the bankruptcy, is not affected by the discharge.²²

²². *Mallin v. Wenham*, 13 A. B. R. 210, 209 Ills. 252. But compare, *Wenham v. Mallin*, 103 Ills. App. 609. Impliedly, In *re Driggs*, 22 A. B. R. 621,

171 Fed. 897 (D. C. N. Y.). Compare, collaterally, In *re Sims*, 23 A. B. R. 899, 176 Fed. 645 (D. C. N. Y.).

Citizens Loan Ass'n v. Boston & Maine R. R., 19 A. B. R. 650, 196 Mass. 528: "The single question presented by this appeal is whether an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, and upon sufficient consideration, to secure a valid subsisting debt, and duly recorded, can be enforced, after the discharge in bankruptcy of the assignor, as to wages earned in the course of the original employment, by the creditor, who has not proved his debt in bankruptcy. A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end. The obligation itself is not canceled. *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Heather v. Webb*, 19 Eng. Rep. 277, 2 Com. Pl. Div. 1. An assignment of future earnings, which may accrue under an existing employment, is a valid contract and creates rights, which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum. *Tripp v. Brownell*, 12 Cush. 376; *Weed v. Jewett*, 2 Metc. 608, 37 Am. Dec. 115; *Brackett v. Blake*, 7 Metc. 335, 41 Am. Dec. 442; *Hartey v. Tapley*, 2 Gray, 565; *Gardner v. Hoeg*, 18 Pick. 168; *Taylor v. Lynch*, 5 Gray, 49; *Lannan v. Smith*, 7 Gray, 150; *St. Johns v. Charles*, 105 Mass. 262; *Lazarus v. Swan*, 147 Mass. 330, 333, 17 N. E. 665; *James v. Newton*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692. These cases proceed upon the theory that the worker under contract for service, though indefinite as to time and compensation and terminable at will has an actual and real interest in wages to be earned in the future by virtue of his contract. He may recover for an unjustifiable interference with such an employment, as for an injury to any other vested property right. *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499. It is plain that one may sell wool to be grown upon his own sheep, or a crop to be produced upon his own land, but not that to be grown or produced upon the sheep or land of another. No more can one assign wages, where there is no contract for service. *Jones v. Richardson*, 10 Metc. 481; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357. But profitable employment is a reality. Wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing, right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mortgagee of future acquired property, who has only the right by contract to act betimes in the future for his protection. *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959. The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no future action on his part. Contracts for personal service are of such a character that their breach is in appropriate cases enjoined. *Lumby v. Wagner*, 1 De G., M. & G. 604; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416. See *Phila. Base Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 9 Am. St. Rep. 627. It may be taken for granted that the right to future wages to be earned under such a contract does not pass to the trustee in bankruptcy. Nor are we dealing here with a contract as to labor in terms or spirit contrary to public policy, as in *Parsons v. Trask*, 7 Gray, 473, 66 Am. Dec. 502. But on the contrary, assignments of wages are recog-

nized as valid by statute. Rev. Laws, c. 189, §§ 32, 33, 34; Id. c. 102, §§ 51, 57 to 67, both inclusive; Id. c. 106, § 63. The present case is not affected by St. 1905, p. 224, c. 308, or St. 1906, p. 366, c. 390. Specific performance of contracts to labor like that in question will not be enforced. *Arthur v. Oakes*, 63 Fed. 310-318, 11 C. C. A. 209, 25 L. R. A. 414; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715. It is only where labor has been voluntarily performed that the question now presented can arise. It is possible that an agreement to execute an assignment, falling short of the creation of a lien, is, when the wages have been actually earned, enforceable in equity, even after a subsequent bankruptcy or insolvency. We do not decide this, however. *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; *Stott v. Franey*, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 132. At lowest the assignment in question became 'a specific equitable lien on the fund' (*Triste v. Child*, 21 Wall. 441, 22 L. Ed. 623), or was 'an independent collateral agreement given by way of guaranty or other security' for the main debt, and there is no reason why such an agreement should not outlive the remedy upon the debt, to secure which it was given (*Shaw v. Silloway*, 145 Mass. 503, 507, 14 N. E. 783). In either event, it was not dissolved by the bankruptcy. We have considered the contrary authorities of *In re West* (D. C.), 11 Am. B. R. 782, 128 Fed. 205; *In re Home Discount Co.* (D. C.), 17 Am. B. R. 168, 147 Fed. 538, and *Leitch v. Northern Pacific Ry. Co.*, 14 Am. B. R. 409, 95 Minn. 35, 103 N. W. 704, with the deference to which they are entitled. They proceed upon considerations as to the effect of an assignment of wages and the rights vesting thereunder in the assignee, as well as public policy pointed out in the latter case, which are inconsistent with what we conceive to be sound reasoning, and opposed to the numerous decisions of this court above cited concerning rights required under assignments of wages. In the absence of a decision to the same effect by the Supreme Court of the United States, we cannot accede to them as authoritative. Nor do we perceive anything inconsistent with the conclusion we have reached, in *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77; *East Lewisbury v. Marsh*, 91 Pa. 96; *Christian & Craft Grocery Co. v. Michael Lyons*, 121 Ala. 84-87, 25 South. 571, 77 Am. St. Rep. 30; *Williams v. Chambers*, Q. B. 337, and *Hanover Nat. Bank v. Moyses*, 186 U. S. 192, 8 Am. B. R. 1, 22 Sup. Ct. 857, 46 L. Ed. 1113, which are cited as generally supporting authorities in *In re Home Discount Co.*, *ubi supra*. The assignment to the plaintiff is a lien which was preserved by § 67d of the Bankruptcy Act."

And the lien is not affected by the discharge, although it may be affected by the adjudication of bankruptcy as a preference if not given for a presently passing consideration.

§ 2678½. Subsequently Earned Wages Coming under Prior Levy.—However, it has been held that an execution, under the New York Code, by virtue of which the creditor is entitled to collect from the bankrupt's employer, without exemption, ten per cent. of the debtor's salary until the debt is paid, does not constitute such a lien on the contract of employment as to carry with it the wages earned subsequently to adjudication.²³

In re Sims, 23 A. B. R. 899, 176 Fed. 645 (D. C. N. Y.): "The remaining question is as to proceeding under the levy to recover 10 per cent of that

²³. See § 1035, note. Compare, § 2736½.

portion of his salary which the bankrupt has earned and shall earn after petition filed. In *re Driggs*, *Ex parte Raymond*, *supra*, I said that there was no difference between exempt wages and wages earned after petition filed. The case involved only exempt wages and the statement was clearly obiter. It was inadvertent, and I think it is wrong. In cases of garnishments, where the obligation garnisheed is unconditional and due in installments, it may be that installments which fall due after petition filed will be covered by the lien. Even if the obligation be conditional, the same thing may be true, if the condition does not involve the performance of services by the bankrupt or his transfer of property. In this case, however, all the salary which the creditors can get after December 20th, 1909, will be part of what the bankrupt has earned and will earn after petition filed. The situation is wholly unlike the case of a merely future obligation, or of a conditional obligation when performance does not depend upon the bankrupt. Should I allow the creditors to levy on wages in fact earned in the future, they would recover upon a past debt from property earned subsequently. This contradicts the whole purpose of a discharge, and I cannot permit it without violating the act. It is not enough that in form the levy may be upon a single chose in action, consisting of the contract of employment. I concede that this is so, but the obligation is quite valueless till the bankrupt performs the condition of service to his employer. Therefore, for the purpose of this act, I shall decide that the wages, which arise from services rendered after petition filed, is covered by the discharge and that the stay should continue as to that."

§ 2679. "Waiver of Exemption" Notes: No Levy on Exempt Property after Discharge.—Notes in which the bankrupt maker has waived exemptions are discharged, although if levy had been made thereon the levy might not have been disturbed; and this is so even though the lien was acquired within the four months preceding the bankruptcy; and, after discharge, no levy can be made thereunder on the exempt property set apart to the bankrupt by the trustee.²⁴

§ 2680. Former Refusal of Discharge Res Adjudicata as to All Claims Then Provable.—The refusal of a discharge is *res adjudicata* as to all provable claims under the bankruptcy; and subsequent new proceedings in bankruptcy do not affect them.²⁵

But while it is true that the former refusal is *res judicata*, yet it is *res judicata* as to the right to discharge rather than as to the dischargeability of the particular debt, and so it is a defense to the present petition for discharge rather than an exception to be pleaded after the discharge has been granted. The question is: "Has the bankrupt a right to renew his application for a discharge from the old debts whose discharge has once been de-

24. *Claster v. Soble*, 10 A. B. R. 446, 22 Pa. Super. Ct. 631. Also compare, *Snyder v. Guthrie*, 17 A. B. R. 902, — Pa. Com. Pleas —. Contra, *Realty Co. v. Gioshio*, 27 A. B. R. 58 (Com. Pleas Pa.); also compare post, § 2711 and ante, §§ 1034, 1104.

25. In *re Feigenbaum*, 9 A. B. R. 595, 121 Fed. 69 (C. C. A. N. Y., reversing 7 A. B. R. 339); inferentially,

In *re Royal*, 7 A. B. R. 636, 113 Fed. 140 (D. C. N. Car.). But see In *re Claff*, 7 A. B. R. 128, 111 Fed. 506 (D. C. Mass.). See *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, quoted at § 2438; impliedly, In *re Silverman*, 19 A. B. R. 460, 157 Fed. 675 (C. C. A. N. Y.); also, compare, analogously, to same effect, §§ 2416, 2437.

nied?" rather than, "Does the new discharge make exception of these still 'provable' debts?" It would seem perilous, indeed, for the creditors under the old bankruptcy to permit a later general decree of discharge to be entered in the new proceedings, and to rely then upon a *res judicata* which was never presented as a bar to the petition itself.²⁶

§ 2681. But Not if Former Refusal Was under State Insolvency Proceedings.—The refusal of discharge in prior proceedings under state insolvency laws will not affect the efficiency of the discharge in bankruptcy under the present act; and such debt is discharged unless it is one of those excepted from discharge under § 17 of the act,²⁷ at any rate, where the record does not show the ground of the refusal.²⁸ And the case is not different if the debt was proved in the former proceedings and not proved in the latter.²⁹

Even though the ground urged were the same, yet the remedy under the federal discharge, being more extensive than that under the state discharge, the state discharge decree would not be *res judicata*.

DIVISION 2.

PLEADING AND PROOF OF DISCHARGE.

§ 2682. Discharge to Be Set Up as Defense, Else Waived.—The discharge must be set up and proved as a defense.³⁰

Collins v. McWalters, 6 A. B. R. 593, 35 N. Y. Misc. 648: "A discharge in bankruptcy is not per se an extinguishment of the debt and no court, other than the court of bankruptcy, is bound to take notice of a discharge. It is, however, a release which may be pleaded."

And if the discharge is not set up and proved, it is waived; and the resulting judgment will be good.³¹

26. See ante, §§ 2437, 2438, 2666, et seq. Also, see *In re Kuffler*, 18 A. B. R. 16, 151 Fed. 12 (C. C. A. N. Y.); *In re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.); *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, quoted at § 2438.

27. *Dean v. Justices of the Municipal Court*, 2 A. B. R. 163, 173 Mass. 453. Compare ante, § 2440.

28. *In re Bybee*, 10 A. B. R. 761, 124 Fed. 1011 (D. C. Calif.). Compare ante, § 2440.

29. *Dean v. Justices of the Municipal Court*, 2 A. B. R. 163, 173 Mass. 453.

30. *Stevens v. Meyer*, 8 A. B. R. 496, 72 N. Y. App. Div. 128; inferentially, *Bk. of Commerce v. Elliott*, 6 A. B. R. 409, 109 Wis. 648; obiter, *In re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.); *Schreiber v. Schomaker*, etc.,

Co., 28 A. B. R. 858 (App. Div. N. Y.); *Gleason v. Thaw*, 28 A. B. R. 473, 196 Fed. 359 (C. C. A. N. Y.).

31. No reopening of judgment to permit the interposition of discharge will be allowed where the judgment creditor was not "duly scheduled" and had no notice. *Reed v. Dippel*, 17 A. B. R. 371, 16 Dist. Rep. 126 (Penn.).

Stevens v. Meyer, 8 A. B. R. 496, 72 N. Y. App. Div. 128; *Collins v. McWalters*, 6 A. B. R. 593, 35 N. Y. Misc. 648; inferentially, *Bk. of Commerce v. Elliott*, 6 A. B. R. 409, 109 Wis. 648; *First National Bank of Broadway, Va. v. Coates*, 32 A. B. R. 361, — Va. —.

But it appears that by special statute in New York, a judgment thus obtained may be canceled, *Walker v. Muir*, 21 A. B. R. 278, 127 App. Div. 163, 111 N. Y. Sup. 465; also, see post, § 2707, and cases there cited.

§ 2683. Facts Showing Jurisdiction to Grant Discharge to Be Plead.—The facts conferring jurisdiction on the court to grant the discharge must be pleaded.³²

But pleading the discharge to have been “duly made” is sufficient in states where that form is sufficient in pleading judgments.³³

§ 2684. Certificate of Discharge under Seal of Court Proves Discharge.—The discharge is sufficiently proved by production of the certificate of discharge under the seal of the United States court.³⁴

§ 2685. Interposition of Discharge Throws Burden on Plaintiff to Show Debts Excepted.—When the discharge has been set up properly, it then rests on the plaintiff to show why he should not be bound thereby.³⁵

§ 2686. No Collateral Attack on Order of Discharge.—The order of discharge may not be questioned or attacked collaterally.³⁶

But it is not a collateral attack on a discharge for a creditor to raise the particular defense that his own claim is not discharged where it is excepted by the statute from the operation of discharge.³⁷

§ 2687. Erroneous Judgment Notwithstanding Discharge Duly Plead and Proved, Res Judicata until Reversed.—If a defense of discharge is erroneously held not to bar a particular debt, error or appeal must be prosecuted, else the judgment is res adjudicata.³⁸

Howe v. Noyes, 15 A. B. R. 103, 47 N. Y. Misc. 338: “It is evident that § 1268 could only have been designed as a summary method of procuring a cancellation of a judgment rendered before a discharge in bankruptcy, because in all cases where judgment has not been perfected before a discharge, the debtor is in a position upon his discharge to plead that fact as a bar to a recovery of judgment and thus obtain full and complete advantage of his discharge in bankruptcy.

^{32.} Analogously (composition), *Broadway Trust Co. v. Manheim*, 14 A. B. R. 122, 47 N. Y. Misc. 415.

^{33.} Analogously (composition), *Broadway Trust Co. v. Manheim*, 14 A. B. R. 122, 47 N. Y. Misc. 415. But compare *Bryant v. Kinyon*, 6 A. B. R. 241, 127 Mich. 152.

Demurrer to answer setting up defense of discharge in bankruptcy admits regular taking of all necessary steps precedent to discharge. *Jarecki Mfg. Co. v. McElwaine*, 5 A. B. R. 751, 107 Fed. 249 (C. C. Ind.).

^{34.} Bankr. Act, § 21 (f): “A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court the regularity

of the proceedings, and of the fact that the order was made.”

Custard v. Wiggerson, 17 A. B. R. 340, 130 Wis. 412.

^{35.} *Broadway Trust Co. v. Manheim*, 14 A. B. R. 123, 47 Misc. N. Y. 415; *In re Peterson*, 22 A. B. R. 549 (Surrogate Ct. N. Y.); apparently contra, *Weidenfeld v. Tillinghast*, 18 A. B. R. 531 (N. Y. City Court).

^{36.} *Custard v. Wiggerson*, 17 A. B. R. 340, 130 Wis. 412; *In re Shaffer*, 4 A. B. R. 728, 104 Fed. 982 (D. C. N. Car.); *Atlantic Dynamite Co. v. Reger*, 29 A. B. R. 659, 200 Fed. 1002 (D. C. W. Va.).

^{37.} *Sutherland v. Lasher*, 11 A. B. R. 780, 41 Misc. N. Y. 240. See ante, § 2667.

^{38.} Compare post, § 2693.

"But it seems to me that no other effect can be given to § 1268 than that it is only applicable to judgments entered before a discharge in bankruptcy for the reason that any other holding would conflict with the doctrine of *res adjudicata*.

"The defense of a discharge in bankruptcy is assuredly available in an action for a debt dischargeable in bankruptcy, and it needs no citation of authorities to convince one familiar with legal rules that a final adjudication of the issue raised by such a defense is conclusive between the parties and hence may not be considered in any subsequent action, proceeding or motion to defeat the effect of the judgment."

And it has been held in some cases that code provisions permitting the cancellation of judgments discharged by bankruptcy, or rendered upon debts discharged thereby, can only refer to judgments rendered before the granting of the discharge in bankruptcy, as any other holding would conflict with the doctrine of *res adjudicata*; ³⁹ but in other cases a contrary holding obtains. ⁴⁰

DIVISION 3.

STAYING SUITS AGAINST THE BANKRUPT TO PERMIT INTERPOSITION OF DISCHARGE; AND BANKRUPT'S FAILURE TO INTERPOSE DISCHARGE.

§ 2688. Suits against Bankrupt Stayed until Adjudication.—Suits on dischargeable debts pending against a debtor at the time of the filing of the bankruptcy petition are stayed, when the filing thereof is brought to the attention of the court where the proceedings are pending, until either he is adjudged a bankrupt or the petition in bankruptcy is dismissed. ⁴¹

§ 2689. Available to Voluntary and Involuntary Bankrupt Alike.—The stay is available whether the bankrupt be a voluntary or an involuntary bankrupt. ⁴²

§ 2690. Stay under § 11 for Bankrupt's Benefit, to Permit Interposition of Discharge.—The stay under § 11 is for the benefit of the bankrupt, to enable him to interpose his discharge. It is not under this provision that the bankruptcy court acts in staying or restraining suits or proceedings affecting the property of the bankrupt belonging to creditors. ⁴³

³⁹. *Howe v. Noyes*, 15 A. B. R. 103, 47 Misc. N. Y. 338. Compare, on germane subjects, *Hussey v. Judson*, 11 A. B. R. 521, 43 N. Y. Misc. 370, and *Stevens v. Meyers*, 8 A. B. R. 496, 72 N. Y. App. Div. 128.

⁴⁰. See post, § 2707; also, see *Walker v. Muir*, 21 A. B. R. 278, 127 App. Div. 163, 111 N. Y. Supp. 465.

⁴¹. Bankr. Act, § 11 (a): "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the

petition; if such a person is adjudged a bankrupt, such action may be further stayed until the twelve months after the date of said adjudication, or, if within that time such person applies for a discharge then until the question of such discharge is determined."

Compare, obiter *In re Federal Biscuit Co.*, 29 A. B. R. 393, 203 Fed. 37 (C. C. A. N. Y.); Instance, *In re Lineberry*, 25 A. B. R. 164, 183 Fed. 338 (D. C. Ala.).

⁴². *In re Geister*, 3 A. B. R. 228, 97 Fed. 322 (D. C. Iowa).

⁴³. See subject of "Restraining Orders" as part of the "Provisional Rem-

Coal Land Co. v. Ruffner Bros., 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.): "Thus far what we have said applies more particularly to cases in which an injunction is sought to stay proceedings in a State court, to the end that the bankrupt himself may have the benefit of the stay, where a personal judgment is sought against him, so that if the suit in the State court is based upon a provable claim and one against which the discharge in bankruptcy would operate, an opportunity, as before stated, would be afforded the bankrupt after his discharge to go into the State court and set it up as a defense in the action. The right of the court of bankruptcy to enjoin proceedings in a State court in order to administer the estate of the bankrupt through the instrumentalities of the general bankruptcy law, is founded upon a different reason."

Marble Co. v. Grant, 14 A. B. R. 289, 135 Fed. 322 (C. C. A. Pa.): "This (is) obviously for the purpose of assuring to the court of bankruptcy exclusive authority to adjudicate the claims which, by their orders of discharge, they may release. It does not apply to a suit brought in a State court to enforce an asserted right in rem under the law of such State."

But compare, erroneous holding, obiter, where the court says that the power is only given for the benefit of the bankrupt's estate. *In re Federal Biscuit Co.*, 29 A. B. R. 393, 203 Fed. 37 (C. C. A. N. Y.); "The Bankruptcy Act authorized the District Court, as a Court of Bankruptcy, to stay suits against the bankrupt founded upon provable claims pending in State Courts at the end of the bankruptcy. It also authorizes such stays in attachment actions instituted within four months of the bankruptcy, the lien of the attachment being invalidated thereby. But the power is given, in both cases, only for the benefit of the bankrupt estate. If the estate have no interest in the suit or action, it cannot properly be stayed."

§ 2691. Debt Dischargeable, Else No Stay.—The debt must be a dischargeable debt, else the suit will not be stayed under this section of the statute.⁴⁴

Thus, stay will not be granted in an action for obtaining money or goods by false pretenses;⁴⁵ nor will an order punishing the bankrupt for

edies" during the pendency of the bankruptcy petition, ante, § 400, and in "Aid of the Collection of Assets," later, ante, § 1596.

⁴⁴ *In re Warth*, 29 A. B. R. 210, 200 Fed. 408 (C. C. A. N. Y., reversing S. C., 28 A. B. R. 41, 196 Fed. 571); *Nat'l Surety Co. v. Medlock*, 19 A. B. R. 654, 2 Ga. App. 665; *In re Cole*, 5 A. B. R. 780, 106 Fed. 837 (D. C. N. Y.); *In re Sullivan*, 2 A. B. R. 30 (Ref. N. Y.); *In re Floyd*, 15 A. B. R. 277 (Ref. N. Y.).

(Perhaps) *White v. Thompson*, 9 A. B. R. 653, 119 Fed. 868 (C. C. A. Ala., for referee's decision, see 10 A. B. R. 790). *Continental National Bank v. Katz*, et al., 1 A. B. R. 19 (Superior Ct. Ill.). *Contra In re Rogers*, 1 A. B. R. 541 (Ref. Ky.): Debt incurred in fiduciary capacity.

Whether to Be "Clearly" Shown to Be within Dischargeable Class.—And that the debt must clearly come within the list of dischargeable debts is laid down as the rule. *In re Sullivan*, 2 A. B. R. 30 (Ref. N. Y.). But there can

hardly be any reason for such a rule—the debt either is or is not dischargeable. Whether it is "clearly" so to the court is immaterial.

Whether Character of Debt to Be Determined from Pleadings.—The character of the suit, it is held in one case, is to be determined by the pleadings. *In re Adler*, 18 A. B. R. 240 (C. C. A. N. Y.); *Karger v. Orth*, 27 A. B. R. 212, 116 Minn. 124.

Habeas Corpus.—The remedy of habeas corpus is also available to protect the bankrupt from arrest on civil process on dischargeable debts, see ante, § 472; but is not available where the debt is not dischargeable, *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.).

⁴⁵ *In re Wollock*, 9 A. B. R. 685, 120 Fed. 516 (D. C. Ills.): This case was decided, however, before the amendment of 1903 made liabilities for obtaining property by false pretenses, nondischargeable. See, *In re Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.).

contempt of the State court in procuring, by perjury and deceit, a stay of proceedings upon a judgment, be stayed;⁴⁶ nor will supplementary proceedings for alimony be stayed.⁴⁷

Turner v. Turner, 6 A. B. R. 289, 108 Fed. 785 (D. C. Ind.): "This is a petition for an injunction restraining the prosecution of proceedings supplementary to execution in a court of the State. * * * The right to the restraining order depends on the question whether the alimony decreed to the defendant is a debt provable against the bankrupt's estate. * * * The authorities hold that alimony is not strictly a debt due to the wife, but rather a general duty of support made specific by the decree of the court. * * * It is a special fund, devoted to the support and maintenance of the wife, provided by the policy of the State to protect her from becoming a public charge, and to secure her from the temptations of a life of vice."

Nor will supplementary proceedings on a judgment for false imprisonment be stayed;⁴⁸ nor on a judgment for willful or malicious injury to person or property, as for instance, on a judgment for forcible detainer;⁴⁹ nor on a judgment for slander;⁵⁰ nor on a judgment for costs against the plaintiff in a slander suit, since the judgment for costs against the plaintiff partakes of the tort nature of the suit itself.⁵¹

Nor will a suit to compel the issuance of a certificate of stock to a stockholder be stayed.⁵² And a stay of an action by a corporation against a bankrupt officer of the corporation who has misappropriated funds and is now holding its records will be vacated, because the debt is non-dischargeable.⁵³

And it has been held that the wilful and wanton conversion of property, amounting practically to larceny, constitutes a wilful and malicious injury to property, the debt for which is not dischargeable, and a motion to restrain the plaintiff and sheriff from issuing body execution against the bankrupt on a judgment obtained against him in the state court was dismissed.⁵⁴

But stay will be granted where the creditor suing is omitted from the bankrupt's schedules but has knowledge of the bankruptcy, for his claim is dischargeable;⁵⁵ and an unliquidated provable claim that was not liquidated in time is nevertheless discharged and may be stayed.⁵⁶ Likewise,

46. *In re Koonsky*, 21 A. B. R. 851, 170 Fed. 719 (C. C. A. N. Y.), referred to in *In re Hall*, 22 A. B. R. 498, 170 Fed. 721 (D. C. N. Y.).

47. *White v. Thompson*, 9 A. B. R. 653, 119 Fed. 868 (C. C. A. Ala., for referee's decision, see 10 A. B. R. 790).

48. *Johnson v. Bruckheimer*, 22 A. B. R. 88, 63 Misc. N. Y. 248.

49. *In re Munroe*, 28 A. B. R. 369, 195 Fed. 817 (D. C. N. Y.).

50. *In re Dowie*, 29 A. B. R. 338, 202 Fed. 816 (D. C. N. Y.).

51. *In re Dowie*, 29 A. B. R. 338, 202 Fed. 816 (D. C. N. Y.).

52. *In re Clipper Mfg. Co.*, 24 A. B.

R. 683, 179 Fed. 843 (C. C. A. N. Y.). It has even been so held where the suit was also to recover damages for refusal to issue. *In re Clipper Mfg. Co.*, 24 A. B. R. 683, 179 Fed. 843 (C. C. A. N. Y.).

53. *In re Gulick*, 26 A. B. R. 362, 186 Fed. 350 (D. C. N. Y.), quoted at § 2787.

54. *In re Arnao*, 32 A. B. R. 88, 210 Fed. 395 (D. C. N. Y.). Compare post, § 2754½.

55. *In re Beerman*, 7 A. B. R. 434, 112 Fed. 663 (D. C. Ga.).

56. *In re Hilton*, 4 A. B. R. 774, 104 Fed. 981 (D. C. N. Y.).

suits for conversions by factors and commission men will be stayed, for such liabilities are dischargeable.⁵⁷

And suit for obtaining the services of an attorney through false pretenses will be stayed for "services" are not "property" within the meaning of this section of the Bankruptcy Act.⁵⁸

§ 2692. But Proceedings on Nondischargeable Debts Stayable Where Creditor's Rights Involved.—But legal proceedings upon even nondischargeable debts may be stayed, or restrained on behalf of creditors where creditors' rights are involved;⁵⁹ and § 11 will not be construed to "stay" the Bankruptcy Court from staying such proceedings.⁶⁰ Or, in such cases, the state court may itself stay the proceedings.⁶¹

§ 2693. Error in Holding Claim Dischargeable No Warrant for Disobedience.—Error of the court in holding a claim to be provable and dischargeable when it is not such, will not authorize a disobedience of the stay.⁶²

In *re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.): "Instead of obeying the order of the bankrupt court, W. C. McCarty proceeded to judgment on the theory that the bankrupt court had no jurisdiction to make such order. It was clearly the duty of W. C. McCarty to either review the order of the referee in the proper way or to obey the same. Disobedience is not the proper method of contesting the validity of the order of the bankrupt court. Jurisdiction is lawfully given to the bankruptcy court to stay proceedings pending bankruptcy upon claims which are provable. As jurisdiction is thus given to the bankruptcy court when application is made to it for a restraining order, under this power to determine whether the claim is thus provable an erroneous decision does not make void the judgment of the court. The court, in passing upon application under this section of the bankruptcy law, is given the right to determine the question of the provability of debts. This is necessarily so in the execution of the power conferred by the statute. In the administration of justice the courts of the United States by all proper means should endeavor to avoid conflict of jurisdiction with the State courts, and a similar obligation rests upon the latter in reference to matters committed by law to the jurisdiction of the former. In the enforcement of the powers conferred by the laws in bankruptcy matters, so long as the bankruptcy court acts in the matter within its powers, its jurisdiction is exclusive and supreme."

§ 2694. Proceedings Other than "Suits" Stayed.—Proceedings other than those technically denominated "suits" may be stayed.⁶³

57. In *re Basch*, 3 A. B. R. 235, 97 Fed. 761 (D. C. N. Y.); In *re Adler*, 18 A. B. R. 240, 152 Fed. 422 (C. C. A. N. Y.); In *re Hale*, 20 A. B. R. 633, 161 Fed. 387 (D. C. Conn.).

58. In *re Thaw*, 24 A. B. R. 759, 180 Fed. 419 (D. C. Pa.), quoted at § 2747, affirmed, sub nom. *Gleason v. Thaw*, 25 A. B. R. 782, 185 Fed. 345 (C. C. A. Pa.).

59. Impliedly, *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

60. *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.).

61. *Ex parte Butler, etc., Co.*, 27 A. B. R. 419, 174 Ala. 237.

62. *Wagner v. U. S.*, 4 A. B. R. 496, 104 Fed. 133 (C. C. A. Ky.); In *re Marcus*, 5 A. B. R. 365, 105 Fed. 907 (C. C. A. Mass.). Compare, § 2687.

63. In *re Hicks*, 13 A. B. R. 654, 133 Fed. 654 (D. C. N. Y.): In this case, the bankrupt was a member of the city fire department and proceedings under a city ordinance to collect dues were stayed.

Thus, "supplementary proceedings," may be stayed.⁶⁴

§ 2695. Ipso Facto Stayed Till Adjudication or Dismissal of Petition.—It has been held that the suit is ipso facto stayed for a time, that is, until the adjudication or dismissal of the petition, and that it requires no action on the part of anyone until after the debtor has been adjudged bankrupt.⁶⁵

In *re DeLany*, 10 A. B. R. 634, 124 Fed. 280 (D. C. N. Y.): "In effect, subdivision 'a' of § 11 of the Bankruptcy Law operates as an injunction on the county judge of Broome county, the plaintiff in the action against DeLany (the judgment creditor) and its attorneys, and the referee, Walker, and they were bound to observe and obey it after adjudication." (Where the court says by the provisions of § 11 (a) the filing of the petition operates of itself as a caveat to all the world, until the adjudication is had or the petition is dismissed.)

Obiter, *Carpenter Bros. v. O'Connor*, 1 A. B. R. 383, 16 Ohio C. C. 526: "The order of procedure in this case should be under the statute as follows: When the petition in bankruptcy was filed by the defendant, all proceedings in the State court should stop. In other words, in the language of the Bankrupt Act as contained in § 11, 'The proceedings shall be stayed.' This is mandatory. The State court has no right to proceed further in an action there pending until the petition in bankruptcy has been adjudicated. When that has been done, the case may be further stayed in the State Court at its discretion."

Obiter and inferentially, *Board of Comrs. Kans. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.): "Every suit against him upon a provable claim is stayed from the date of the filing of the petition." Quoted further at §§ 629, 1519, 1521.

The provisions of § 11 (a) seem to be more direct to the protection of the bankrupt, to the end that he may not lose the benefit of his discharge, than to the protection of creditors; yet they incidentally do operate to protect creditors during the period intervening between the filing of the petition and the adjudication.

§ 2696. Thereafter, Further Stayed, on Application, until Discharge Heard.—Thereafter they may be further stayed, not to exceed one year from the adjudication, unless beforehand the petition for discharge is filed, and then until the question of the debtor's discharge has been settled and the debtor thus been given an opportunity to present the discharge as a defense.⁶⁶

⁶⁴. See post, § 2702. And compare ante, § 2691; In *re Warth*, 29 A. B. R. 210, 200 Fed. 408 (C. C. A. N. Y., reversing 28 A. B. R. 41, 196 Fed. 574).

⁶⁵. Also, In *re Mertens*, 14 A. B. R. 229 (D. C. N. Y.). But see *Kinmouth v. Braeutigam*, 65 N. J. L. 165, 46 Atl. 769 (approved in *In re Engle*, 5 A. B. R. 372, 105 Fed. 893; and, also, see *Kinmouth v. Braeutigam*, 10 A. B. R. 83, 63 N. J. Eq. 103, on cognate

point). Compare *Cruchet v. Red Rover Min. Co.*, 18 A. B. R. 814, 155 Fed. 486 (D. C. Mass.).

⁶⁶. Bankr. Act, § 11 (a). For form of such orders, see In *re Fortunato*, 9 A. B. R. 631, 123 Fed. 622 (D. C. N. Y.); *Carpenter Bros. v. O'Connor*, 1 A. B. R. 383, 16 Ohio C. C. 526; In *re Camelo*, 28 A. B. R. 353, 195 Fed. 632 (D. C. N. Y.); In *re Harrington*, 29 A. B. R. 66, 200 Fed. 1010 (D. C. N. Y.).

And it is the right of the bankrupt to have the suit stayed.⁶⁷

Such further stay must, however, be applied for; for the adjudication does not itself operate as a further stay.⁶⁸

§ 2697. Not Only Pending Suits but Also Subsequent Suits Stayed.—Not only suits pending at the time of the filing of the bankruptcy petition may be so stayed, but those filed afterward and before discharge is granted.⁶⁹

In *re Wollock*, 9 A. B. R. 687, 120 Fed. 516 (D. C. Ills.): "There is nothing in the point made by counsel that the court is without power to stay a proceeding begun after the filing of a petition in bankruptcy. The argument reduces itself to an absurdity. Section 11 of the Act of 1898 provides that the court shall stay a suit which is founded upon a claim from which a discharge would be released, etc.; the plain object of the section being to bring all matters affecting provable claims into the District Court. Section 11 provides that nothing in that section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not therein enumerated. Clause 15, § 2, provides that the court has such jurisdiction at law and in equity as will enable it to 'make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of this act.' It will be seen that the court is required to stay only provable claims, by the statute. This would not limit its power to provable claims in a case, the prosecution of which would interfere with the proper enforcement of the act. It is admitted by the petition presented herein for a restraining order that the action sought to be stayed is an action on the case for fraud. If tried, the verdict must be 'guilty' or 'not guilty.' Fraud is the gist of the action. Unless fraud is proven, there can be no recovery. The judgment of the court will be conclusive as to the existence or absence of fraud. Manifestly, under the holding above set out, the court is entirely without jurisdiction to stay the proceedings, under the language of the statute; and where, as in this case, there is nothing but the question of fraud involved, to which a discharge cannot be pleaded, there can be no embarrassment to the administration of the bankruptcy cause by this court—consequently no case made for the general powers of this court."

§ 2698. Further Stay Discretionary.—The further stay is discretionary.⁷⁰

In *re Lesser*, 3 A. B. R. 759, 100 Fed. 433 (C. C. A. N. Y.): "The making of such an order is discretionary with the District Court—the language being 'such action may be stayed'—and that discretion should not be interfered with, unless it has been abused."

But unless assets of the estate are involved, it is improper to grant a stay on application of the trustee.

67. In *re Burke*, 19 A. B. R. 51, 168 Fed. 994 (D. C. N. Y.).

68. *Maas v. Kuhn*, 22 A. B. R. 91, 130 N. Y. App. Div. 68, quoted at § 2704.

69. *Mitchell, etc., Co. v. Carroll*, 27 A. B. R. 894, 193 Fed. 616 (C. C. A. Ohio); In *re Mustin*, 21 A. B. R. 147,

165 Fed. 506 (D. C. Ala.); *Gleason v. Thaw*, 25 A. B. R. 782, 185 Fed. 345 (C. C. A. Pa., affirming 24 A. B. R. 758); In *re Nuttal*, 29 A. B. R. 800, 201 Fed. 557 (D. C. N. Y.).

70. *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

Compare, *In re Mercedes Import Co.*, 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y., reversing *In re Mercedes Import Co.*, 20 A. B. R. 648): "The district judge was not obliged to grant the stay under § 11 of the Bankruptcy Act, but did so because he thought that the creditor had no better equity against the surety than he had against the bankrupt. As the trustee in bankruptcy has no interest whatever in the claim against the surety we think the creditor's rights and equities are questions to be disposed of by the State court."

§ 2698½. Court of Bankruptcy Has Paramount Jurisdiction.—And the court of bankruptcy has paramount power to determine whether a suit pending in a State court should be stayed or not, and the exercise of this power rests in the discretion of the judge, the exercise of which will not be interfered with by an appellate court unless it appears that it has been abused.⁷¹

§ 2699. Comity Requires Requests for Stay First in Court Where Action Pending.—The further stay may be, and usually is, asked for in the court wherein the action is pending. Comity would seem to require application to be made there first.⁷²

In re Geister, 3 A. B. R. 228, 97 Fed. 322 (D. C. Iowa): "The proper practice to be followed in this class of cases is to make the application to the court wherein the action sought to be stayed is pending, and it is the duty of that court, whether it be State or Federal, to grant a stay according to the provisions of the Bankrupt Act. * * *

"The rule thus announced under the provisions of the Act of 1867 is clearly applicable to § 11 of the Act of 1898, and points out the course to be pursued in cases like that now under consideration. The bankrupt who is the defendant in the State Court should file in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in § 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy, it will become the duty of the State Court to grant the stay prayed for. Not only is this the proper method of bringing to the judicial notice of the State Court the fact that proceedings in bankruptcy have been instituted, and therefore the bankrupt has a right to a stay of the case until the question of a discharge can be heard, but it is also the proper procedure, for the reason that the creditors, who are the plaintiffs in the suit sought to be stayed, are parties to the action in the State Court, are within its jurisdiction, and will therefore be bound by its action in the premises, whereas, they are not now subject to the jurisdiction of this court, as they have not been notified of the filing of this petition now before the court, nor in any way brought within the actual jurisdiction of this court. For these reasons the prayer of the petition is refused, on the ground that the application for a stay should be made in the state Court in which the case is pending."

[1867] *Hill v. Harding*, 107 U. S. 631: "The terms of this enactment are as

71. *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

72. *Kinmouth v. Braeutigam*, 10 A. B. R. 85, 63 N. J. Eq. 103 (Court of Chancery N. J.); see also, *Kinmouth v. Braeutigam*, 4 A. B. R. 344, 65 N. J. L. 165.

Inferentially, *Maas v. Kuhn*, 22 A. B. R. 91, 130 N. Y. App. Div. 68.

Compare analogous proposition as to the restraining of legal proceedings in aid of creditors, §§ 362, 1637, 1860, 1904.

broad and as peremptory as possible: 'No creditor whose debt is provable shall be allowed to prosecute to final judgment' any suit thereon against the bankrupt; and such suit 'shall, upon application of the bankrupt, be stayed.' This provision, like all laws of the United States made in pursuance of the constitution, binds the courts of each State as well as those of the nation. Upon the application of the bankrupt to the court, State or national, in which the suit is pending, it is the duty of that court to stay the proceedings, 'to await the determination of the court in bankruptcy on the question of the discharge,' unless there is unreasonable delay on part of the bankrupt in endeavoring to obtain his discharge."

[1867] *Boynton v. Ball*, 121 U. S. 457: "The State court could not know or take judicial notice of the proceedings in bankruptcy unless they were brought before it in some appropriate manner, and the provisions of this section show plainly that it does not thereupon lose jurisdiction of the case, but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of his discharge."

§ 2700. But Bankruptcy Court May Enjoin if Necessary.—The bankruptcy court may issue a restraining order further staying the action in the State court, if necessary.⁷³

Thus, where an execution from a justice of the peace is levied on exempt property, and the bankrupt pleads his adjudication, but the justice disregards it and renders judgment and orders sale—comity will not require the bankruptcy court to ask the justice for an order on the constable to surrender the property; but the bankruptcy court may order its marshal to seize the property.⁷⁴ Again, an execution on a judgment obtained after the adjudication in an action pending at the time of the bankruptcy by a creditor omitted from the schedules, may be enjoined.⁷⁵ But the state court's officer, generally, should not be enjoined until first notice has been given to him of the application for the injunction;⁷⁶ nevertheless, a temporary restraining order may issue without such notice, if absolutely necessary.⁷⁷

So, a suit brought by a trustee in bankruptcy in a state court, for the recovery of an alleged preference, will be stayed where the defendant in such suit becomes himself a bankrupt.⁷⁸

§ 2700½. Referee May Issue Stay.—The referee may issue the stay.⁷⁹

⁷³. In *re DeLany*, 10 A. B. R. 634, 124 Fed. 280 (D. C. N. Y.). Impliedly, In *re Fortunato*, 9 A. B. R. 630, 123 Fed. 622 (D. C. N. Y.). Compare analogous proposition where the stay is sought in behalf of creditors, ante, §§ 362, 1904, et seq.

In *re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.); In *re Hassler*, 29 A. B. R. 502, 204 Fed. 139 (D. C. Minn.).

⁷⁴. In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.). But see, *White v. Thompson*, 9 A. B. R. 653, 119 Fed.

808 (C. C. A. Ala.).

⁷⁵. In *re Beerman*, 7 A. B. R. 434, 112 Fed. 663 (D. C. Ga.).

⁷⁶. Obiter, In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.).

⁷⁷. In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.).

⁷⁸. In *re Tomlinson*, 27 A. B. R. 780, 193 Fed. 101 (D. C. N. Y.).

⁷⁹. Impliedly, In *re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.); In *re Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.).

And it is the referee's duty, upon an application for a stay, to inquire whether the claim of nondischargeability is real and in good faith, or is merely colorable.

In *re Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.): "When it is sought to stay a suit pending in the State court, it is the duty of the referee, when the matter is before him and he has jurisdiction, to inquire into the nature of the cause of action pending in the State court, and to satisfy his conscience that the plaintiff in the State court is proceeding upon a claim which he asserts bona fide is not dischargeable. If the referee comes to the conclusion, from his investigation, that such claim is not merely colorable, but is bona fide, he has no jurisdiction to try the merits of the suit, but must remand the parties to the State court, and permit that court to pass upon the merits of the contention as to whether it is barred by the discharge in bankruptcy."

§ 2701. Referee No Jurisdiction to Enjoin Court or Court Officer.—But the referee has not the jurisdiction to issue the restraining order, or injunction, to restrain the proceedings of a court or of an officer of a State or of the United States. The judge, only, may do so.⁸⁰

§ 2702. Stay Applies to All Incidents of Proceedings in State Courts.—This stay applies to all incidents of the proceedings in the state court.

Thus, supplementary proceedings in the state court may be so stayed.⁸¹

In *re Lesser*, 3 A. B. R. 758, 99 Fed. 913 (C. C. A. N. Y.): "There is, of course, no contention that the initiation of the proceedings supplementary to execution less than a month before the Lessers were adjudicated bankrupts gave the petitioning bank any superior lien. The only interference to which the order will subject it is that it will not be able to examine Tobias Lesser in supplementary proceedings as to what disposition was made of the property of the firm and its individual members, thus obtaining information which might be material or useful in the prosecution of the equity suit. Since the petitioner, however, may subject the bankrupts to a most searching examination in the District Court, and thereby obtain the same information, it is not easy to see in what way petitioner is prejudiced."

In *re DeLany & Co.*, 10 A. B. R. 634, 124 Fed. 280 (D. C. N. Y.): "The judgment debtors made a mistake in not applying to this court for a stay of the supplementary proceedings instead of failing to appear for examination. But this may be regarded as an application to stay all proceedings on the judgment mentioned, including the supplementary proceedings, and proceedings founded thereon and connected therewith, to punish for the contempt, which evidently was not intended, the party evidently supposing that the adjudication in bankruptcy released her from any obligation to appear and submit to an examination."

⁸⁰. See ante, §§ 528, 1918.

⁸¹. In *re Adams*, 1 A. B. R. 96 (Ref. N. Y.); In *re Fortunato*, 9 A. B. R. 630, 123 Fed. 622 (D. C. N. Y.); In *re DeLong*, 1 A. B. R. 66 (Ref. N. Y.); In *re Kletchka*, 1 A. B. R. 479, 92 Fed. 901 (D. C. N. Y.); [1867] *Johnson v.*

Rogers, 15 N. B. R. 110, 13 Fed. Cases 794; [1867] In *re Pitts*, 9 Fed. 542; [1867] *Olney v. Tanner*, 10 Fed. 101, 113 (affirmed in 18 Fed. 636); In *re Burke*, 19 A. B. R. 51, 155 Fed. 703 (D. C. N. Y.); instance, *Maas v. Kuhn*, 22 A. B. R. 91, 130 N. Y. App. Div. 68.

And a motion to commit the bankrupt for contempt therein is stayed as well as all other proceedings, and disobedience of the stay is itself a contempt.⁸²

Thus, an execution issued on a judgment rendered after the adjudication in bankruptcy but before the discharge, should be perpetually stayed, if the claim was a dischargeable claim at the time of the bankruptcy.⁸³ Likewise, an execution levied on exempt property, on a judgment rendered by a justice of the peace in disregard of the adjudication although pleaded by the bankrupt, will be restrained.⁸⁴

And the omission from the bankrupt's schedules of the creditor who is suing the bankrupt, does not prevent stay being granted.⁸⁵ But the stay should not be extended to the benefit of others than the bankrupt;⁸⁶ thus, not to those jointly liable with him.

§ 2703. No Further Stay than for Year, unless Application for Discharge Filed within Year Not Yet Acted upon.—Such further stay cannot be demanded, as of right, for a longer period than one year from the date of the bankrupt's adjudication, unless the petition for discharge is filed and not yet acted on;⁸⁷ nor for even that period if the discharge is granted or refused within the year.

§ 2704. If Further Stay Not Applied for, Judgment and Orders of State Court Valid.—If the bankrupt fails to apply for such further stay, the state court may go on and render judgment in personam against him, and the judgment (at any rate if rendered after the discharge has been granted or refused) will be good, notwithstanding the bankruptcy.⁸⁸

Impliedly, *Maas v. Kuhn*, 2 A. B. R. 91, 130 N. Y. App. Div. 68: "Until such stay is obtained, however, parties have the right to prosecute action or enforce collection of judgments. * * * Until a stay of collection is obtained, the plaintiff has a right to the continuance of his execution and the appropriation on his judgment of ten per cent of the defendant's salary."

Obiter, in *re DeLany*, 10 A. B. R. 635, 124 Fed. 280 (D. C. N. Y.): "If not stayed, they continue, and the debtor, though a bankrupt, may be compelled to observe and obey all orders of the State court lawfully made."

Save and except that, if it be rendered upon a dischargeable debt and be

⁸². In *re Fortunato*, 9 A. B. R. 630, 123 Fed. 622 (D. C. N. Y.), a case occurring before adjudication. But not by the referee, in *re Siebert*, 13 A. B. R. 348, 133 Fed. 781 (D. C. N. J.). Apparently, contra, in *re DeLong*, 1 A. B. R. 66 (Ref. N. Y.). Also, apparently contra, in *re Adams*, 1 A. B. R. 96 (Ref. N. Y.).

⁸³. *Barnes Mfg. Co. v. Norden*, 7 A. B. R. 553, 67 N. J. L. 493.

⁸⁴. In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.).

⁸⁵. In *re Beerman*, 7 A. B. R. 434, 112 Fed. 663 (D. C. Ga.).

⁸⁶. In *re DeLong*, 1 A. B. R. 66 (Ref. N. Y.).

⁸⁷. Bankr. Act, § 11 (a). In *re Flanders*, 10 A. B. R. 379, 121 Fed. 236 (D. C. Vt.).

⁸⁸. Impliedly, *Kinmouth v. Braeutigam*, 10 A. B. R. 85, 63 N. J. Eq. 103; also, *Kinmouth v. Braeutigam*, 4 A. B. R. 344, 65 N. J. L. 165; inferentially, in *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.); inferentially, *Bank of Commerce v. Elliott*, 6 A. B. R. 409, 109 Wis. 648; inferentially, *Snyder v. Guthrie*, 17 A. B. R. 902 (Penn. Com. Pleas.).

rendered before the consideration of the bankrupt's petition for discharge, it will itself be discharged.⁸⁹

§ 2705. Or if Discharge Refused, Court May Render Judgment in Personam and Judgment Will Be Good.—If the bankrupt's discharge is refused, the court may go on and render judgment in personam.⁹⁰

§ 2706. Or if Not Interposed Though Granted, Judgment Valid.—If the bankrupt fails to interpose his discharge after it has been granted, a judgment thereafter rendered against him, in a pending suit started before the bankruptcy, is good;⁹¹ and, of course, is also valid if rendered on a right of action arising after the institution of bankruptcy proceedings, even though before discharge.

§ 2707. Statutory Cancellation of Subsequently-Rendered Judgments.—However, in some states the statute permits the cancellation of judgments rendered on causes of action arising before bankruptcy, after the discharge in bankruptcy is granted.⁹²

And this exception prevails, although, after the discharge was granted and the stay was still in existence, leave had been asked and granted to plead the discharge but the discharge had never been pleaded.⁹³ But the exception does not prevail where the ex-bankrupt agrees to let judgment be taken in reliance upon the statute permitting such cancellation, the consideration for the agreement being the withdrawal by the plaintiff of allegations of fraud.⁹⁴

And cancellation will be vacated on application of a creditor whose address was not "duly scheduled" and who did not have actual notice of the petition for discharge.⁹⁵

^{89.} Bankr. Act, § 63 (a), (5). Apparently contra, *Snyder v. Guthrie*, 17 A. B. R. 902 (Pa. Com. Pleas).

^{90.} Obiter, *In re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.).

^{91.} *Stevens v. Meyer*, 8 A. B. R. 496, 72 N. Y. App. Div. 128; *Bank of Commerce v. Elliott*, 6 A. B. R. 409, 109 Wis. 648; *Collis v. McWalters*, 6 A. B. R. 593, 35 N. Y. Misc. 648, 72 N. Y. Supp. 203; obiter, *In re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.).

Vacating judgments in order to permit plea of discharge: *Kinmouth v. Braeutigam*, 4 A. B. R. 344, 63 N. J. L. 103. See same case in 10 A. B. R. 85, 63 N. J. Eq. 103.

^{92.} *Hussey v. Judson*, 11 A. B. R. 520, 47 N. Y. Misc. 338. Compare, on general subject, *Howe v. Noyes*, 15 A. B. R. 103, 43 N. Y. Misc. 370; *Walker v. Muir*, 21 A. B. R. 278, 127 App. Div. 163, 111 N. Y. Supp. 465; *Walker v. Muir*, 21 A. B. R. 593, 194 N. Y. 420.

^{93.} *Hussey v. Judson*, 11 A. B. R. 520, 72 N. Y. App. Div. 128.

^{94.} *Stevens v. Meyers*, 8 A. B. R. 496, — N. Y. —.

Likewise where a bankrupt formerly was refused a discharge upon the opposition of a judgment creditor who had no personal knowledge of a second bankruptcy proceedings in which his judgment was scheduled and his address, though appearing in the city directory, was misstated, the application for a discharge in the second proceeding having been granted, the judgment creditors' default on a subsequent motion to discharge the judgment under § 1268 of the Code of Civil Procedure, will be opened, it appearing that notice of such motion was served upon one of the original attorneys of record, who to the knowledge of the bankrupt, did not represent the creditor after the entry of the final judgment. *In re Quackenbush*, 19 A. B. R. 647, 122 App. Div. 456, 106 N. Y. Sup. 773.

^{95.} *Murphy v. Blumenreich*, 19 A. B. R. 910, 123 App. Div. 910, 123 App. Div. (N. Y.) 645.

A judgment on a partnership debt where one partner alone is served—the judgment being solely against him—will not be cancelled as to the other partner on the ground of the latter's individual bankruptcy.^{95a}

But the debt may be discharged even though the judgment be not canceled of record, and the creditor may not share in the estate of a deceased bankrupt because of such failure to have the judgment canceled.⁹⁶

In New York the Surrogate's Court has jurisdiction to disallow claims on judgments discharged by subsequent bankruptcy, even though such claims have not been "cancelled" of record in accordance with the statutory provisions, such cancellation not being an exclusive remedy, but being merely for the purpose of removing a cloud upon the title.⁹⁷

§ 2708. No Vacating of Judgment Rendered after Discharge, for Interposition of Discharge.—And a judgment rendered *after* a discharge has been granted will not be opened up to let in the defense of discharge, for the defense of discharge, though perfectly legal and valid, is not favored.⁹⁸

§ 2709. Stay Only Protects Bankrupt from Judgment in Personam—Judgments in Rem as to Property Unaffected.—The stay when asked for by the bankrupt, in order to give him opportunity to plead his discharge, as, likewise, the bar of the discharge when pleaded and sustained, extends no further than to protect the bankrupt from a judgment in personam, or other personal order, the discharge in and of itself not being a defense to proceedings in rem; for, as previously noted,⁹⁹ the discharge bars debts, not liens nor the assertion of interests in property.¹

Marble Co. v. Grant, 14 A. B. R. 288, 135 Fed. 322 (C. C. A. Pa.): "Section 11 (a) * * * does not apply to a suit brought in a State court to enforce an asserted right in rem under the State law."

95a. *In re Gruber*, 21 A. B. R. 467, 129 App. Div. N. Y. 297.

96. *In re Peterson*, 22 A. B. R. 549 (N. Y. Surrogate Ct.).

97. *In re Peterson*, 24 A. B. R. 270, 137 App. Div. N. Y. 435, affirming 22 A. B. R. 549.

98. Compare § 2711.

99. See ante, § 2668.

1. *Bk. of Commerce v. Elliott*, 6 A. B. R. 409, 109 Wis. 648, quoted ante, § 2668. *Berry v. Jackson*, 8 A. B. R. 485, 41 S. E. 698, 45 Ga. 191, quoted ante, § 2668. *Continental Nat'l Bk. v. Katz*, 1 A. B. R. 19 (Super. Ct. Ills.); *Reid, Murdock & Co. v. Cross*, 1 A. B. R. 34 (Super. Ct. Ills.). Compare *Blick v. Nimmo*, 30 A. B. R. 770, 121 Md. 139.

In re DeLong, 1 A. B. R. 66 (Ref. N. Y.): Supplementary proceedings against bankrupt and others, joint

judgment debtors, should be stayed only as to bankrupt.

Instance, foreclosure of mortgage (though here it is additionally said that the foreclosure was instituted before the four months period—an immaterial consideration), *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.).

Staying Garnishment of Wages.—Compare, *In re Driggs*, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.); also, compare ante, §§ 1678, 1683, 451, 1100, 1447½, 2678.

Judgment in Personam Pending Bankruptcy, Valid Lien on Exempt Property Where Not Stayed.—It was held in one instance that where a judgment in personam was rendered against the bankrupt pending the bankruptcy proceedings, the bankrupt having failed to apply for a stay of the action, it would be a valid lien on his

Of course, however, if the proceedings in rem against the property are dependent on obtaining a judgment in personam against the bankrupt, the obtaining of the discharge may frustrate the proceedings in rem.²

§ 2710. Stay Dissolved after Discharge Granted, or Refused, or Dismissed.—The stay should be dissolved after the discharge has been granted, or refused, or the petition for discharge dismissed; and the parties should be relegated to their remedies in the suit.³

In re Flanders, 10 A. B. R. 379, 121 Fed. 936 (D. C. Vt.): "By the terms of the Bankrupt Act, such a stay is to be granted only for the time during which the question of discharge may be open and pending. * * * If a discharge is denied, or the time for asking one is allowed to expire without application, there is no occasion for such stay. The suit may proceed as if there had been no bankruptcy, except as the trustee may intervene to save property rights for the estate."

And the stay should be dissolved upon dismissal for lack of prosecution of the petition for discharge.

In re Lederer, 10 A. B. R. 492, 125 Fed. 96 (D. C. N. Y.): "If the bankrupt files a petition for discharge, and then fails to carry on the proceedings with reasonable promptness, the court, upon a proper application, will dismiss the application for discharge for want of prosecution, and vacate all injunctions staying proceedings at law."

§ 2711. Qualified Stay Where Levy Sought on Exempt Property Not Exempt as to Levy Sought.—It would also seem that, if there would be no exemptions against a levy of execution under the particular judgment sought to be obtained, the stay should be so qualified as to permit judgment to be taken for the purpose of levying on the exempt property. This is a necessary corollary of the rule that the bankruptcy court will not administer exempt property for the benefit of certain creditors as to whom the property is not exempt. It would be inequitable to deprive such creditors of an opportunity to reduce their claims to judgment for the purpose of levying execution on the exempt property, or otherwise subjecting the same by legal proceedings.⁴

But the obtaining of such stay is necessary; for, if the creditor permit the debtor to obtain his discharge before the right in rem has become fastened upon the exempt property, such subjecting of the exempt property will be frustrated.

After judgment has been obtained on a judgment note containing waiver of exemptions, reopening will be refused where a levy is sought on exempt

exempt property, though discharged as to personal liability. *Gregory Co. v. Cale*; 27 A. B. R. 131, 115 Minn. 388, 508. To same effect *Snyder v. Guthrie*, 17 A. B. R. 902, — Pa. Com. Pleas. —. Compare § 1452.

2. See ante, § 1104, also, § 2668; also, see *Bowen & Thomas v. Keller*, 22 A.

B. R. 727, 130 Ga. 31; *Boggs v. Dunn*, 26 A. B. R. 846, 160 Calif. 283.

3. In re *Rosenthal*, 5 A. B. R. 799, 108 Fed. 368 (D. C. N. Y.).

4. See "Exemptions," ante, §§ 1103, 1104, et seq. Compare, inferentially, *Maas v. Kuhn*, 22 A. B. R. 91, 130 App. Div. N. Y. 68, quoted at § 1102.

property on the doctrine of *Lockwood v. Exchange Bank*, 190 U. S. 902, 10 A. B. R. 107, under which the discharge itself would have been stayed for the very purpose of permitting judgment to be taken.^{4a}

· § 2712. **And Where Judgment Necessary to Perfect Rights against Surety, or Property.**—Likewise, where a creditor's rights against a surety are dependent upon his getting judgment against the bankrupt principal, it would seem a proper exercise of discretion to permit proceedings to be instituted, or pending proceedings to be prosecuted to judgment, for the purpose of fixing the surety's liability.⁵

In *re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.): "Though I cannot wholly vacate the stay, I can, however, permit the petitioner to enter his judgment against the bankrupts, and to do so much else as may be necessary to perfect any rights he may have under the undertaking, if any. * * * If the petitioner can enforce the undertaking, I will aid him to do so."

Likewise, a creditor may be permitted to prosecute a pending action where it is necessary that it be reduced to judgment or decree in order to secure his rights.⁶ And, in general, the bankruptcy court has jurisdictions to suspend the proceedings in bankruptcy for a reasonable time, to allow proceedings to be prosecuted in other jurisdictions for the enforcement of the rights of the parties.⁷

But the question might still remain whether the State law would permit the State court to render a judgment qualified in such manner.⁸

§ 2712½. **Amendment of Answer to Set Up Discharge in Behalf of Surety, Whether Allowed.**—Amendment of an answer to set up a discharge in behalf of a surety or in order to protect him from liability on his undertaking, has been refused.⁹

§ 2713. **No Deprivation of Right of Discharge by Staying Discharge Hearing or Refusing to Stay Creditor's Suit Where Judg-**

4a. *Snyder v. Guthrie*, 17 A. B. R. 902 (Pa. Ct. Com. Pleas).

5. See "Rights of Creditors against Third Parties Jointly or Secondly Liable," § 1524. *King v. Block Amusement Co.*, 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. Supp. 102; In *re Mercedes Import Co.*, 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y., reversing 20 A. B. R. 648), quoted at § 2698; In *re Maher*, 22 A. B. R. 290, 169 Fed. 997 (D. C. Ga.); In *re Maaget*, 23 A. B. R. 14, 173 Fed. 232 (D. C. N. Y.), wherein the rule is affirmed but not applied; *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47, 72 Md. 461; but compare qualifications of rule in *Crook-Horner Co. v. Gilpin*, 23 A. B. R. 350, 112 Md. 1. Compare *Windisch-Muhlhauser v. Simms*, 26 A. B. R. 714, 129 La. 134; *Schunack v. Art Metal Novelty Co.*, 26

A. B. R. 731, 84 Conn. 331; *Butterweck v. Bowen*, 26 A. B. R. 718, 33 R. I. 40.

6. Instance, issuance of scire facias on mortgage after adjudication. In *re Engle*, 5 A. B. R. 372, 374, 105 Fed. 893 (D. C. Pa.).

Instance to perfect rights against property left with sureties on redelivery bond in garnishment proceedings, In *re Maher*, 22 A. B. R. 290, 169 Fed. 997 (D. C. Ga.).

7. Compare, dissenting opinion in *City of Waco v. Bryan*, 11 A. B. R. 481, 127 Fed. 79 (C. C. A. Tex.).

8. Compare *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47, 72 Md. 461; also, compare, *Crook-Horner Co. v. Gilpin*, 23 A. B. R. 350, 112 Md. 1.

9. *Obiter*, *King v. Block Amusement Co.*, 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. Supp. 102, quoted at § 1447.

ment Requisite to Perfect Creditor's Rights against Sureties, etc.

—Where the bankruptcy court has refused to stay a creditor's suit in order to enable the creditor to perfect his rights against exempt property, or against sureties or others in similar relations, and where, on the contrary, it has even stayed the hearing on the bankrupt's own application for discharge in order to prevent the discharge being interposed as a bar to the perfecting of rights, such refusal to stay the creditor's proceedings and such staying of the bankrupt's discharge, do not deprive the bankrupt of any substantial right nor take from him the benefit of his discharge; for the judgment so obtained is itself discharged, so far as its effect as a judgment in personam is concerned, though valid so far as concerns the fixing of the creditor's rights against property or sureties. And this is so, because, by the wise forethought of the framers of the Act, such judgment, so obtained "after the filing of the petition and before the consideration of the bankrupt's application for a discharge," is itself, by § 63 (a) (5), declared to be a "provable debt," and by virtue of being a "provable debt," is discharged by § 17 of the Act, discharging "all provable debts except, etc."¹⁰

§ 2713½. **Contempt for Disobedience of Stay.**—Disobedience of the stay is punishable as a contempt.¹¹ And this is so of a stay issued by a referee.¹²

DIVISION 4.

REVIVAL OF DISCHARGED DEBT.

§ 2714. **Revival of Discharged Debt.**—The bar of the discharge may be waived and the original debt revived.¹³ This applies to composition cases as well as to cases where the estate is distributed in bankruptcy.¹⁴

§ 2715. **No New Consideration Necessary.**—No new consideration is necessary to support the waiver: the existence of the liability itself is sufficient, although it would be unenforceable by legal proceedings but for the waiver.¹⁵

§ 2716. **Part Payment on Account Insufficient to Revive Debt.**—Neither part payment, nor partial payments on account from time to time,

10. Instance, although point not adverted to, *Barnes Mfg. Co. v. Norden*, 7 A. B. R. 553, 67 N. J. L. 493. But compare instance where rule apparently disregarded, obiter, *Snyder v. Guthrie*, 17 A. B. R. 902, — Pa. Com. Pleas —.

11. *In re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.). See subject of "Contempt," § 2330, et seq.

12. *In re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

13. *Gruenberg v. Trainor*, 11 A. B. R. 776, 40 N. Y. App. 232; *Mut. Res. Fund Life Ass'n v. Beatty*, 2 A. B. R.

244, 93 Fed. 747 (C. C. A. Calif.); obiter, *In re Shaffer*, 4 A. B. R. 728, 104 Fed. 982 (D. C. N. Car.); instance, *Anthony v. Sturdivant*, 27 A. B. R. 356, 173 Ala. 521; *Zavelo v. Reeves*, 227 U. S. 629, 29 A. B. R. 496, quoted at § 2722.

14. Impliedly, obiter, *Mandell & Co. v. Levy*, 14 A. B. R. 549, 47 N. Y. Misc. 147; *Cohen v. Lachenmaier*, 27 A. B. R. 416, 147 Wis. 649.

15. *Gruenberg v. Trainor*, 11 A. B. R. 776, 40 N. Y. Misc. 232; *Mut. Res. Fund Life Ass'n v. Beatty*, 2 A. B. R. 244, 93 Fed. 982 (C. C. A. Calif.).

will, ipso facto, waive the discharge.¹⁶

§ 2717. But Discharge Waivable by New Promise.—But the discharge is waivable by a new promise.¹⁷

International Harvester Co. v. Lyman, 10 A. B. R. 450, 90 Minn. 275: "A definite promise of a debtor is sufficient to revive the obligation after a discharge in bankruptcy."

§ 2718. New Promise Not Necessarily in Writing.—The new promise need not be in writing,¹⁸ unless so required by state law.^{18a}

§ 2719. But to Be More than Mere Acknowledgment of Debt—Equivalent of Promise to Pay Necessary.—But it must be more than a mere acknowledgment that there was once such a debt and that it was just. It must be the equivalent of a promise to pay it.¹⁹

Thornton v. Nichols & Lemon, 11 A. B. R. 304, 119 Ga. 50: "A written admission that the debt was once due is not sufficient: the admission must be of a present subsisting liability."

Obiter, *Mandell v. Levy*, 14 A. B. R. 549, 47 N. Y. Misc. 147: "The simple acknowledgment that a debt is still existing which is sufficient to remove the bar of the Statute of Limitations is insufficient to revive a debt discharged in bankruptcy." But this rule is perhaps due to local statute in the State of New York.

§ 2720. And to Be Certain, Unequivocal and Clear.—The new promise must be certain, unequivocal and clear, and not indefinite.²⁰

Inferentially, *International Harvester Co. v. Lyman*, 10 A. B. R. 450, 90 Minn. 275: "A definite promise by a debtor is sufficient to revive the obligations after a discharge in bankruptcy; also—the form of language employed is not important if the purpose to assume the debt is clear and unequivocal."

Thus, it is not sufficient that it be to pay "if ever able."

16. *Dyer v. Isham*, 4th Ohio C. 429; *Grill v. Solomon*, 82 Ala. 85; *Willetts v. Catherson*, 3 Ills. App. 644; *Biele v. Ogilvie*, 2 Greene 326 (Iowa); *Heim v. Chapman*, 171 Mass. 347; *Camb Sav. Inst. v. Littlefield*, 6 Cush. 210; *Jacobs v. Carpenter*, 161 Mass. 15; *Stark v. Stinson*, 23 N. H. 259; *Lawrence v. Harrington*, 122 N. Y. 408; *Wheeler v. Simmons*, 60 Hun 404; *In re Hazelton*, 1 Weekly Notes of Cases 67; *Warren v. Bishop*, 23 Vt. 607.

17. *Gruenberg v. Trainor*, 11 A. B. R. 776, 40 Misc. N. Y. 232; obiter, *In re Shaffer*, 4 A. B. R. 728, 104 Fed. 982 (D. C. N. Car.).

18. *Thornton v. Nichols & Lemon*, 11 A. B. R. 304, 119 Ga. 50; *Smith v. Stanchfield*, 7 A. B. R. 498, 84 Minn.

343; *Mut. Res. Fund Life Ass'n v. Beatty*, 2 A. B. R. 244, 93 Fed. 747 (C. C. A. Calif.); obiter, *Mandell & Co. v. Levy*, 14 A. B. R. 549, 47 N. Y. Misc. 147.

18a. As by statute in New York: *Tomplins v. Hazen*, 5 A. B. R. 62, 165 N. Y. 18; *Mandell v. Levy*, 14 A. B. R. 549, 47 N. Y. Misc. 147.

19. *Coe v. Rosene*, 27 A. B. R. 175, 66 Wash. 73.

20. Obiter, *Mandell v. Levy*, 14 A. B. R. 549, 47 N. Y. Misc. 147; *Finnell v. Armoura*, 26 A. B. R. 802, 39 Utah 316; *Coe v. Rosene*, 27 A. B. R. 175, 66 Wash. 73; instance, *Old Town Nat. Bank v. Parker*, 30 A. B. R. 602, 121 Md. 61.

§ 2721. May Be Conditional, if Definite.—The new promise may be conditional;²¹ but the condition must not be indefinite, and must be shown to have been complied with.

Smith v. Stanchfield, 7 A. B. R. 498, 84 Minn. 343: "In this case the maker of a promissory note agreed to pay the debt if the payee would give him time. In the absence of proof that the offer was accepted and a definite time fixed, such offer did not justify a finding that the debt had been revived."

§ 2722. New Promise after Filing of Petition and before Discharge, Sufficient.—It has been held by the Supreme Court of the United States that inasmuch as the discharge reverts to the commencement of the proceedings, a new promise to pay a provable debt is as effectual to revive the debt when made after the filing of the petition in bankruptcy and before the discharge as when made after the discharge.²²

Zavelo v. Reeves, 227 U. S. 629, 29 A. B. R. 496: "It is settled, however, that a discharge while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankruptcy acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual, when made after the filing of the petition and before the discharge, as if made after the discharge. [cases cited] Our attention is not called to any decision in point arising under the present Bankruptcy Act, but we deem it clear that the same rule should be applied."

§ 2723. Acceptance of New Promise Requisite.—The new promise must be accepted.²³

§ 2724. Must Be Accepted in Terms Offered.—It must be accepted in the terms offered; and a rejection of the terms offered, and insistence on other terms will be insufficient.

International Harvester Co. v. Lyman, 10 A. B. R. 450, 90 Minn. 275: "Where, after such discharge, in response to an offer by the debtor to pay the original obligation in installments, the creditor expressly declines to assent to the conditions, and insists upon payment of the whole amount, the debt is not revived."

²¹ *Smith v. Stanchfield*, 7 A. B. R. 498, 84 Minn. 343.

²² See, also, *Old Town National Bank v. Parker*, 30 A. B. R. 602, 121 Md. 61; *Gruenberg v. Trainor*, 11 A. B. R. 776, 40 Misc. N. Y. 232; contra,

Thornton v. Nichols & Lemon, 11 A. B. R. 304, 119 Ga. 50.

²³ *International Harvester Co. v. Lyman*, 10 A. B. R. 450, 84 Minn. 343; *Smith v. Stanchfield*, 7 A. B. R. 498, 84 Minn. 343.

§ 2725. **Conditional Promise Accepted as Offered, Sufficient.**—The new promise may be conditional, and, if accepted as offered, it will be sufficient to revive the debt,²⁴ provided it be not indefinite.

§ 2726. **Action on Revived Debt to Be Brought on Original Consideration.**—The action may be brought on the original consideration.²⁵

§ 2727. **New Promise Not to Be Pleaded nor Proved in First Instance.**—The new promise need not be pleaded nor proved in the first instance.²⁶ To do so would be to anticipate a defense. The bar of the discharge is merely matter of defense to be pleaded. If pleaded, then the new promise is in turn to be pleaded, by way of avoidance.

§ 2728. **Allegations, in Pleading New Promise.**—It was held before the Supreme Court settled the rule to the contrary as noted ante, § 2722, that in pleading the new promise, it must be alleged and proved that the new promise was made both after the discharge was granted and before the suit on the account was begun.²⁷ But it is only necessary to allege it was made after the filing of the petition;^{27a} and probably a new promise, pending the suit, might be pleaded by supplemental pleading. The precise time of the new promise should be pleaded.²⁸ And the words of the new promise should be pleaded in *haec verbis*, or in substance.²⁹

DIVISION 5.

WHAT OBLIGATIONS AND RIGHTS ARE DISCHARGED AND WHAT NOT DISCHARGED.

§ 2729. **Contractual Relations Not Dissolved by Discharge, unless Mergeable in "Provable" Debt.**—Contractual relations, as such, are not dissolved by the bankrupt's discharge; they continue in full force except in so far as they may have become merged in provable claims.³⁰

Watson v. Merrill, 14 A. B. R. 458, 136 Fed. 359 (C. C. A. Kans.): "An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary in *In re Jefferson* (D. C.), 2 Am. B. R. 206, 93 Fed. 448; *Bray v. Cobb* (D. C.), 3 Am. B. R. 788, 100 Fed. 270; and *In re Hays, Foster & Ward Co.* (D. C.), 9 Am. B. R. 144, 117 Fed. 879. Its effect is to transfer to the trustee all the property of the bank-

24. Impliedly, *International Harvester Co. v. Lyman*, 10 A. B. R. 450, 90 Minn. 275.

25. *Gruenberg v. Trainor*, 11 A. B. R. 776, 40 N. Y. Misc. 232.

26. *Gruenberg v. Trainor*, 11 A. B. R. 776, 40 N. Y. Misc. 232.

27. *Thornton v. Nichols & Lemon*, 11 A. B. R. 304, 119 Ga. 50. Contra, inferentially, as to the new promise being made after the discharge: it is enough that it was made after the adjudication even if before the discharge,

Gruenberg v. Trainor, 11 A. B. R. 776, 40 N. Y. Misc. 232. Also, contra, *Zavelo v. Reeves*, 227 U. S. 629, 29 A. B. R. 496.

27a. See ante, § 2722.

28. *Thornton v. Nichols & Lemon*, 11 A. B. R. 304, 119 Ga. 50.

29. *Thornton v. Nichols & Lemon*, 11 A. B. R. 304, 119 Ga. 50.

30. See ante, "Effect of Adjudication on the Rights of Parties," §§ 451, 641, 1118, 2675.

rupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements, and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and since his obligation to pay rents which are to accrue after the filing of the petition in bankruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so throughout the entire field of contractual obligations the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. In *re Curtis* (La.), 9 Am. B. R. 286; In *re Ells* (D. C.), 3 Am. B. R. 564, 98 Fed. 967, 968; *Witthaus v. Zimmerman*, 11 Am. B. R. 314, 316, 86 N. Y. Supp. 315; *White v. Griffing*, 44 Conn. 437, 446, 447; In *re Pennewell*, 9 Am. B. R. 490, 119 Fed. 139, 55 C. C. A. 571."

Obiter, In *re Brew. Co.*, 16 A. B. R. 114, 143 Fed. 579 (D. C. Mo.): "As a discharge in bankruptcy under § 1, cl. 12, means no more than 'the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by the Act,' and the claim for damages for a possible future breach of a contract is not a debt provable against the estate, in the absence of any refusal on the part of the bankrupt to recognize the contract, and he has not voluntarily or positively disabled himself from performing it, where its performance does not become obligatory until after the adjudication in bankruptcy, my conclusion is that the claim in question is not one provable in bankruptcy."

Such contractual obligations as are not merged in provable debts are not discharged, and are collectible out of the bankrupt's new estate.³¹

31. Compare, In *re Collignon*, 4 A. B. R. 250 (Ref. N. Y.): The court in this case held, in effect, that rent to accrue on a lease not expired at the

time of the bankruptcy can not be liquidated, and is, therefore, not a provable debt, nor affected by the bankrupt's discharge. This rule is not

§ 2730. **Relation of Landlord and Tenant Not Severed.**—The relation of landlord and tenant is not severed by the discharge.³²

§ 2731. **All "Provable" Debts Discharged, Save Those Excepted: if Not "Provable," Not Discharged.**—All provable debts, demands and claims are discharged, except those specially excepted by § 17 (A) of the act;³³ and debts, demands and claims not provable, are not discharged.³⁴

Crawford v. Burke, 195 U. S. 176, 12 A. B. R. 666: "If plaintiff's claim was not a provable debt, or was expressly excepted from the operation of the discharge, the decision of that court was right, but if it was covered by the discharge such discharge was a complete defense."

Tindle v. Birkett, 15 A. B. R. 179, 171 N. Y. 520, affirmed in 18 A. B. R. 121, 205 U. S. 183: "Since the debt upon which the claim of the plaintiffs is founded clearly falls within the category of provable debts enumerated in § 63a of the Bankruptcy Act, it is quite as clearly covered by the discharge in bankruptcy unless the fact that the debt originated in fraud excludes it from the operation of the discharge."

Burnham v. Pidcock, 5 A. B. R. 45 (affirmed in 5 A. B. R. 590, 68 N. Y. Supp. 1007): "In short, unless the right of action, whatever it be, falls within one of the exceptions specified in the act, it is, after liquidation by judgment, barred by the discharge under said act."

In re *United Button Co.*, 15 A. B. R. 399, 140 Fed. 495 (D. C. Del., affirmed, sub nom. *Brown & Adams v. Button Co.*, 17 A. B. R. 565): "It is an elementary proposition that a discharge in bankruptcy is no bar to the enforcement of demands against a bankrupt not provable under the Act. To undertake to except such demands from the operation of a discharge is an absurdity."

varied by the fact that, after the bankruptcy, the landlord, by reletting the premises, was able to ascertain the probable deficiency. Such reletting constitutes a new debt which, while collectible from the after-acquired property of the bankrupt, can not be allowed against his estate in the hands of the trustee.

32. In re *Curtis*, 9 A. B. R. 286, 109 La. 171; *Witthaus v. Zimmerman*, 11 A. B. R. 314, 91 N. Y. App. Div. 202; *Watson v. Merritt*, 14 A. B. R. 458, 136 Fed. 359 (C. C. A. Kans.), quoted supra, § 2729; contra, In re *Jefferson*, 3 A. B. R. 174, 93 Fed. 951 (D. C. Ky.); contra, In re *Hinckel Brew. Co.*, 10 A. B. R. 484, 103 Fed. 942 (D. C. N. Y.); contra, obiter, In re *Pennewell*, 9 A. B. R. 490, 119 Fed. 139 (C. C. A. Mich.); contra, obiter, *Atkins v. Wilcox*, 5 A. B. R. 317, 105 Fed. 595 (C. C. A.). See ante, "Discussion as to the Effect of Adjudication in Bankruptcy upon the Relation," §§ 451, 641, 653, 981, 1118, 2675, 2729. See interesting article in 39 *American Law Reg. (N. S.)* 656: "Does the relation of landlord and tenant become severed by the operation of the Bankrupt Law." Compare, *Shapiro v.*

Thompson, 24 A. B. R. 1, 160 Ala. 363.

33. *Drake v. Vernon*, 25 A. B. R. 69, 26 S. Dak. 354.

34. Compare, subject of "Provable Debts," ante, § 625, et seq. Bankr. Act, § 17 (a): "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except * * *"

Bankr. Act, § 1 (11): "Debts shall include any debt, demand or claim provable in bankruptcy."

Bankr. Act, § 63 (a): "Debts of the bankrupt may be proved and allowed against his estate which are, etc., * * *"

Tindle v. Birkett, 18 A. B. R. 179, 171 N. Y. 520 (affirmed in 18 A. B. R. 121, 205 U. S. 185); obiter, In re *Pettingill & Co.*, 14 A. B. R. 732, 137 Fed. 840 (D. C. Mass.); *Arrington v. Arrington*, 13 A. B. R. 89, 132 Fed. 200 (D. C. N. Car.); In re *Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.); In re *Marcus*, 5 A. B. R. 365, 105 Fed. 907 (C. C. A. Mass.); *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31, affirming *Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676; In re *American Vacuum Cleaner Co.*, 26 A. B. R. 621, 192 Fed. 939 (D. C. N. J.). Compare ante, § 633, note.

Obiter, In re Gerson, 6 A. B. R. 11, 105 Fed. 891 (C. C. A. Penn.): "Of course, if not provable, such liabilities are not discharged."

Obiter, Ruhl-Koblegard Co. v. Gillespie, 22 A. B. R. 643, 61 W. Va. 554, 56 S. E. 898: "A discharge in bankruptcy releases the bankrupt from all debts and claims which are made provable against his estate and which existed on the day the petition was filed, except such debts as are by the Bankruptcy Act of 1898 excepted from a discharge in bankruptcy."

Thus, judgments for penal fines are not provable nor dischargeable;³⁵ nor are judgments that are in the nature of police regulations, such as those for the support of a bastard child.³⁶ Nor are contracts of the same nature discharged.

Dunbar v. Dunbar, 190 U. S. 340, 10 A. B. R. 151: "In relation to that part of the husband's contract to pay for the support of his minor children until they respectively became of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the States. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contracts to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. The contract was a recognition of such liability on his part. We think it was not the intention of Congress, in passing a Bankruptcy Act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not in any event terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfillment thereof should be so discharged. It is true his promise is to pay to the mother, but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose."

Nor are judgments in the nature of police regulations, such as those for the support of a wife, discharged.³⁷

Audubon v. Shufeldt, 181 U. S. 575, 5 A. B. R. 832: "The Bankrupt Act of 1898 provides, in § 1, that a 'discharge' means 'the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act;' and includes, in § 63, among the debts which may be proved against his estate, 'a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing,' at the time of the petition in bankruptcy,

³⁵. In re Moore, 6 A. B. R. 590, 111 Fed. 145 (D. C. Ky.). Contra, In re Alderson, 3 A. B. R. 544, 98 Fed. 583 (D. C. W. Va.). Thus, as to judgment on forfeited bond for appearance in criminal action, In re Weber (Peo. v. Weber), 211 N. Y. —, 160 N. E. 58.

³⁶. In re Baker, 3 A. B. R. 101, 96

Fed. 954 (D. C. Kans.); McKittrick v. Cahoon, 95 N. W. 223, 89 Minn. 383.

³⁷. Compare, Dunbar v. Dunbar, 10 A. B. R. 144, 190 U. S. 340; Lynde v. Lynde, 181 U. S. 183; Welty v. Welty, 63 N. E. 161 (Ills.); Barclay v. Barclay, 184 Ills. 375.

whether then payable or not, and debts 'founded upon a contract, express or implied.' 30 Stat. 541, 563.

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one State, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another State, and may therefore be there enforced by suit. *Barber v. Barber* (1858), 21 How. 582; *Lynde v. Lynde* (1901), 181 U. S. 183. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by an action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by a court of a different jurisdiction. * * *

"The result is that neither the alimony in arrear at the time of the adjudication in bankruptcy, nor alimony occurring since that adjudication, was provable in bankruptcy, or barred by the discharge."

Debts not comprehended within § 63, which enumerates the debts that are provable,³⁸ are not discharged.³⁹

§ 2732. If Capable of Being "Proved," Debt Discharged Whether Actually Proved or Not.—If the debt be "provable" or capable of being proved, it is discharged (unless expressly excepted) whether actually "proved" or not.⁴⁰

Tindle v. Birkett, 205 U. S. 183, 18 A. B. R. 121 (affirming 15 A. B. R. 179): "This court held that plaintiff's claim was 'provable under the Bankruptcy Act,' that is, was 'susceptible of being proved,' and that it might have been proved under § 63a as founded upon an open account or upon a contract express or implied,' if plaintiff had chosen to waive the tort and take his place with the other creditors of the estate."

Inferentially, *Crawford v. Burke*, 195 U. S. 176, 12 A. B. R. 659: "Under this section whether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether that debt was 'provable' under the Bankruptcy Act, that is, susceptible of being proved."

§ 2733. Tort Claims Discharged, if Tort Might Be Waived and Claim Be Presented ex Contractu.—Thus, tort claims for money are

38. Compare, ante, as to what debts are "provable," § 625, et seq.

39. *Brown & Adams v. Button Co.*, 17 A. B. R. 565, 149 Fed. 48 (C. C. A. Del., affirming *In re United Button Co.*, 15 A. B. R. 399, 140 Fed. 495 (D. C. Del.).

40. *Wood v. Carr*, 10 A. B. R. 577, 242 Ky. 2144; obiter, *In re Kuffer*, 18 A. B. R. 587, 153 Fed. 667, 155 Fed. 1018 (D. C. N. Y.); inferentially, *Grant Shoe Co. v. Laird*, 212 U. S. 445, 21 A. B. R. 484.

discharged, if they are of such nature that the tort may be waived and the claim presented in contract.⁴¹ But even though the tort be a waivable tort, and the tort actually be waived, yet if the liability be one declared to be excepted from the operation of discharge, it will not be discharged because of actual waiver or waivability of the tort.⁴² Even where the contract actually has been waived and suit brought in tort, a discharge pending the suit is a good bar, for although the debt be not yet reduced to a judgment for fraud and so be dischargeable as a judgment, it is yet a provable debt, for it is *capable* of being presented *ex contractu*.⁴³

But in an action of trover, even though the plaintiff elects to take a money judgment, the discharge is not a defense because the issue in trover is one of title and not of debt.⁴⁴

§ 2733½. Claims ex Contractu Discharged Though Also Presentable in Tort.—Conversely, claims *ex contractu* are dischargeable though they may also be presentable in tort; as, for example, a claim for breach of warranty on a sale, even though actual fraud also existed sufficient for an action of deceit.⁴⁵

§ 2734. Also Unliquidated Claims, if Capable on Liquidation of Being Presented ex Contractu.—Unliquidated claims that might have been liquidated but were not liquidated, are nevertheless discharged, if they were capable of being presented in form *ex contractu*.⁴⁶

§ 2735. Only Debts Existing at Date of Filing Petition, Discharged.—Only debts existing at the date of the filing of the bankruptcy petition are discharged.⁴⁷

Thus, it has been held, that attorney's fees incurred after the filing of the petition and before the adjudication, not being for services relating to the bankruptcy, are not provable claims and therefore are not discharged.⁴⁸ Likewise, a judgment for costs obtained after adjudication is not dischargeable.⁴⁹

41. *Tindle v. Birkett*, 205 U. S. 185, 18 A. B. R. 121 (affirming 15 A. B. R. 179); *Crawford v. Burke*, 12 A. B. R. 659, 195 U. S. 176; *Mackel v. Rochester*, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.); *In re Hale*, 20 A. B. R. 633, 161 Fed. 387 (D. C. Conn.); *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31.

42. *Mackel v. Rochester*, 14 A. B. R. 429, 434, 135 Fed. 904 (D. C. Mont.); *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31. Apparently *contra*, *In re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.).

43. *Crawford v. Burke*, 195 U. S. 176, 12 A. B. R. 659; *Mackel v. Rochester*, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.).

44. *Birmingham Fertilizer Co. v.*

Cox & Son, 28 A. B. R. 934, 10 Ga. App. 699, quoted at § 2668.

45. *Obiter*, *Grant Shoe Co. v. Laird Co.*, 212 U. S. 45, 21 A. B. R. 484.

46. *In re Hilton*, 4 A. B. R. 774, 104 Fed. 981 (D. C. N. Y.); *Grant Shoe Co. v. Laird*, 212 U. S. 445, 21 A. B. R. 484.

47. *In re Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.); *obiter*, *Ruhl-Koblegard Co. v. Gillespie*, 22 A. B. R. 643, 61 W. Va. 554.

48. *In re Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.).

49. *In re Marcus*, 5 A. B. R. 365 (C. C. A. Mass, affirming 5 A. B. R. 19, 104 Fed. 331). But compare, *Aiken v. Haskins*, 6 A. B. R. 46, 34 N. Y. Misc. 505.

Thus, where a bankrupt partner, at the date of his individual adjudication, was indebted neither to the firm nor to the other partner, the claim of the solvent partner, upon liquidation of the firm affairs out of the bankruptcy court, is not a provable debt in the individual bankruptcy since it was not owing at the date of adjudication.⁵⁰

Again, a promise to buy stock at a future day which day happens to fail on a date after the seller's adjudication of bankruptcy, has been held not to have given rise to a provable debt as of the date of the filing of the bankruptcy petition nor, consequently, to be released by the bankrupt's discharge.

Phoenix Nat'l Bk. v. Waterbury, 23 A. B. R. 250, 197 N. Y. 161, affirming *Phoenix Nat'l Bk. v. Waterbury*, 20 A. B. R. 140, 108 N. Y. Supp. 391: "By this provision of the Bankruptcy Act, it is evident that two things must concur, in order that a debt of the bankrupt shall be provable. There must be a fixed liability, as evidenced by a judgment, or a written instrument, and it must be absolutely owing at the time of the filing of the petition in bankruptcy; however the time of payment may be deferred. Looking at the contract in question in the light of the provision, we find that there was neither a present sale, nor a present purchase, of the stock by the parties, when making 't, and if that be so, how could there arise any 'liability,' 'absolutely owing,' until, by efflux of time, or an exercise of the defendants' option, the contract matured? The agreement of each party was one which had relation, exclusively, to the future, whether as to obligation, or as to payment. The defendants promised to purchase the stock in 1900 (reserving an option to do so at an earlier date), at a price measured by the sum of \$25,000 and the amount of interest, at the rate of six per cent, which would have accrued on that sum from April 2nd, 1894. The plaintiff promised to sell the stock to the defendants in 1900 (or at an earlier date, if the defendants exercised their option). The agreement provided for a future transaction and, meanwhile, if the stock described was then held in plaintiff's possession, its property in it remained unaffected. Until May 1st, 1900, the plaintiff undertook to be ready to sell and deliver such an amount of stock, if called for, and could have no claim against the defendants, prior thereto, or to such a call. The defendants were under no obligation to purchase the stock from the plaintiff before May 1st, 1900, unless they choose to do so. When, therefore, as the result of the filing of the petition in bankruptcy, the defendants were adjudicated bankrupts, in 1899, the situation under the contract was that, as yet, no liability had arisen, which, within the very precise definition of the Bankruptcy Act, could be said to be one 'absolutely owing' by them. Ordinarily, the insolvency of a party to an executory contract of sale is not equivalent to a breach. *Pardee v. Kanady*, 100 N. Y. 121; *Vandegrift v. Cowles Engineering Co.*, 161 Id. 435, 444. If, however, the adjudication in bankruptcy could have been treated by the plaintiff as a breach, or renunciation, of the contract, from the impossibility of performance created by the bankrupts before performance was due, then the plaintiff's claim would have been for the damages. But, as that was an optional matter, it was not obliged to present such a claim and could abide its time, and, unless called upon previously by the trustee in bankruptcy, or the defendants, make tender of the stock at the date fixed for its purchase and delivery. I do not think that the bankruptcy of the defendants was, necessarily, to be considered as equivalent to a renunciation by them of the contract, or to a repudiation of

50. *Obiter*, In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.).

their ability to perform. It was susceptible of being regarded as one holding out a possible promise of future profit. If it had been then profitable, it was within the power of the trustee in bankruptcy to adopt it and to have exercised the reserved option, by calling upon the plaintiff for the stock. Short of such action, there was no way by which any obligation, represented by the contract, could have been altered from a purely contingent liability to one 'absolutely owing' by the defendants. There could be no inception of an absolute indebtedness prior to the day in May, 1900; unless, prior to that time, there was a demand for the stock, followed by its delivery. Assuming that the plaintiff could have elected to prove a claim for damages as for a breach of the contract, if the trustee in bankruptcy did not elect to keep it, within the cases of *In re Pettingill* (C. C. A.), 14 Am. B. R. 757, 137 Fed. 143, and of *In re Neff* (C. C. A.), 19 Am. B. R. 23, 157 Fed. 57, how can that affect the question, whether any 'liability' was 'absolutely owing' by the bankrupt? It was a matter of election on the part of the plaintiff, purely."

However, the reasoning of this case is not wholly to be approved. It would seem that the liability was "absolutely owing" at the date of the filing of the bankruptcy petition, though the time of performance was in the future—each side was bound, the seller being bound to deliver either the stock or its money equivalent, certainly a liability sufficiently "fixed" it would seem.

§ 2736. Contingent Claims Not Provable, Not Discharged.—Contingent claims that are not provable, are not released by the discharge.⁵¹

Thus, a contract of annuity for the support of a divorced wife as long as she lives and does not remarry, is not released.

Dunbar v. Dunbar, 190 U. S. 340, 10 A. B. R. 145: "Conceding that the Bankruptcy Act provides for discharging some classes of contingent demands or claims, this is not, in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the Bankruptcy Act of 1898, yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which, in our opinion, is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood. A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables. Mr. Justice Bradley, in *Riggin v. Magwire*, 15 Wall. 549, speaking for the court, said that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the Bankruptcy Act of 1841. The fifth section of that act gave the right to prove 'uncertain and contingent demands,' but it was held that a contract such as above described was not within that section.

"It was remarked by the justice in that case that if the contract had come within the category of annuities and debts payable in future, which are absolute and existing claims, that the value of the wife's probability of survivorship after death of her husband might have been calculated on the principles of life annuities.

51. *Williams & Co. v. U. S. Fidelity Co.*, 28 A. B. R. 802, 11 Ga. App. 635.

"But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a provable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question; inclination, age, health, property, attractiveness, children. These would at least enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question."

Similarly, a solvent partner who has undertaken the liquidation of the firm affairs upon the individual bankruptcy of the other partner, has no provable claim against the individual partner, arising out of the liquidation, where the bankrupt partner was not indebted to the firm nor to himself at the date of adjudication; the partnership relation by which the bankrupt partner becomes bound by way of contribution to the solvent partner under such circumstances being a purely contingent liability.⁵²

§ 2736½. Subsequently Earned Salary.—Subsequently earned salary, under a previously existing employment, may not be garnisheed.⁵³

However, as to the effect of the discharge on such salary where an assignment of it has been made, see ante, "Effect of Adjudication on the Rights of Parties," §§ 451, 1118, 2678.

§ 2737. Costs Incurred Prior to Petition Dischargeable.—Costs of a creditor incurred prior to the filing of the bankruptcy petition are provable debts against the bankrupt and are therefore discharged, provided the cause of action sued on was a provable debt. And this is so, whether a judgment was rendered or not, and whether the judgment rendered was rendered before or after the filing of the petition.⁵⁴

§ 2738. Incurred after, Not Discharged.—Costs of a creditor incurred after the filing of the bankruptcy petition, which ripen into rights against the bankrupt, are not provable debts and are not discharged, but the bankrupt remains liable for them.⁵⁵

§ 2739. Judgment for Breach of Promise of Marriage Discharged.—Judgments for breach of promise to marry are discharged,⁵⁶ but not when the breach of promise was accompanied with seduction.^{56a}

^{52.} In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.).

^{53.} In re Ludeke, 22 A. B. R. 460, 171 Fed. 292 (D. C. N. Y.).

^{54.} Aiken, Lambert & Co. v. Haskins, 6 A. B. R. 46, 34 N. Y. 505. But compare, as to judgments for costs, In re Marcus, 5 A. B. R. 365, 104 Fed. 331 (C. C. A. Mass.).

Drake v. Vernon, 25 A. B. R. 69, 26 S. Dak. 354. Costs due defendant in action of slander.

^{55.} Lambert & Co. v. Haskins, 6 A. B. R. 46, 34 N. Y. Misc. 505.

^{56.} Finnegan v. Hall, 6 A. B. R. 645, 35 Misc. 773, 72 N. Y. Supp. 347; In re McCauley, 4 A. B. R. 122, 101 Fed. 223 (D. C. N. Y.); Bond v. Millikin, 17 A. B. R. 811, 109 N. W. 774, 134 Iowa 447.

^{56a.} Distler v. McCauley, 6 A. B. R. 491, 66 N. Y. App. Div. 42; obiter, Bond v. Millikin, 17 A. B. R. 811, 109 N. W. 774, 134 Iowa 447.

In *re Warth*, 29 A. B. R. 210, 200 Fed. 408 (C. C. A. N. Y.): "It has been the policy of the Bankruptcy Act to discharge honest debtors but not to afford a shield to willful wrongdoers and to avoid the possibility that seducers might take advantage of it. Congress in 1903 passed an amendment providing that liability for 'the seduction of an unmarried female' should not be discharged. The provision is broad and we have no doubt applies and was intended to apply to every case where there is liability for seduction whether the action to enforce such liability be based, as is permitted in some States, directly upon the essential wrong, or by reason of the limitations of the common law, be founded upon the incident—the refusal to marry. To say that Congress intended to distinguish between these cases is to say that it intended to further favor seducers in those jurisdictions where they are already favored by adherence to an artificial form of action which often operates to prevent the enforcement of a morally just demand. The contention is made that as the action is in form for breach of contract some portion of the damages awarded must have been for the loss of the matrimonial alliance and that as the judgment can not be split up all must be discharged. As already pointed out, however, the real wrong for which the plaintiff recovered was for the seduction, and in the absence of any showing to the contrary it will be presumed that the substantial damages were awarded for that."

§ 2740. Judgments for Torts Discharged, Though Liability on Which Founded, Not.—Thus, since judgments are provable, judgments for torts, even where the tort itself is not provable because not capable of being presented in form *ex contractu*, are nevertheless discharged.

Burnham v. Pidcock, 5 A. B. R. 45 (affirmed in 5 A. B. R. 590, 168 N. Y. Supp. 1007): "It was held, under the Bankruptcy Law of 1841, that a judgment obtained in an action of tort was a debt dischargeable under and by force of the bankruptcy law. In *re Book*, 3 McLean 317, Fed. Cas. No. 1,637. And see *Comstock v. Grout*, 17 Vt. 512; *Vrouch v. Gridley*, 6 Hill 259. And under the Act of 1867, it was held, that a judgment for assault and battery was a debt dischargeable in bankruptcy. *Manning v. Keyes*, 9 R. I. 224. In short, unless the right of action, whatever it be, falls within one of the exceptions specified in the act, it is, after liquidation by judgment, barred by the discharge under said act."

At any rate, a judgment for tort is discharged so long as it is not for a wilful or malicious injury to person or property, or for some other non-dischargeable liability.⁵⁷ But a judgment based upon a liability expressly exempted from the operation of discharge is not discharged—the creditor does not lose his position of advantage simply because a court has decided formally that his claim is just and has reduced it to a form where it has become a "provable debt."⁵⁸

Peters v. United States ex rel. Kelly, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill.): "The character of the 'liability,' as that word is used in amended § 17 (2) of the Bankruptcy Act, is not changed by the fact that the liability was reduced to judgment. *Tinker v. Colwell*, 193 U. S. 473, 11 Am. B. R. 568; *Boynton v. Ball*, 121 U. S. 457, 466; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 292."

⁵⁷. In *re Wakefield*, 31 A. B. R. 42, 207 Fed. 180 (D. C. N. Y.).

⁵⁸. *Tomkins as Administratrix v.*

Williams, 23 A. B. R. 886, 137 App Div. N. Y. 521.

But a mere liability not yet reduced to judgment arising from having committed a personal injury is not provable nor can it be presented in form *ex contractu*, and consequently is not dischargeable,⁵⁹ even though a verdict has been rendered thereon before the bankruptcy.⁶⁰

§ 2741. Claims of Sureties and Endorsers against Bankrupt Principal Discharged.—Thus, claims of sureties on the bankrupt's obligations are discharged as against the bankrupt, although the sureties have paid nothing thereon until after the bankruptcy has occurred.⁶¹

Likewise, the bankrupt maker's liability to the payee who has been obliged to pay the holder after the maker's adjudication as a bankrupt but before his discharge, is itself discharged.⁶² And in general, contracts of endorsement are discharged, before the liability thereunder has become enforceable by action through default of the maker.⁶³ Thus, the bankrupt's accommodation endorsement is discharged, even though the note does not fall due until after bankruptcy.⁶⁴

§ 2742. Stockholder's Liability Dischargeable, if Fixed.—Stockholder's liability for debts of the corporation is discharged by the stockholder's own bankruptcy, if the facts essential to the maintenance of a stockholders' liability suit have already occurred;⁶⁵ but it is not discharged

59. *In re Ostrom*, 26 A. B. R. 273, 185 Fed. 988 (D. C. Minn.); [1867] *Block v. McClelland*, Fed. Cas. No. 1462.

60. *In re Ostrom*, 26 A. B. R. 273, 185 Fed. 988 (D. C. Minn.); [1867] *Black v. McClelland*, Fed. Cas. No. 1462.

61. Sureties rights, perhaps, partake of the nature of the original obligation as to dischargeability. Inferentially, *In re Colacula*, 13 A. B. R. 292, 133 Fed. 255 (D. C. Mass.); inferentially, *In re Blumberg*, 1 A. B. R. 633, 133 Fed. 845 (D. C. Tenn.); *Hayer v. Comstock*, 7 A. B. R. 493, 115 Iowa 187; compare, *In re New*, 8 A. B. R. 566, 116 Fed. 116 (D. C. Ohio); compare, *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.); contra, inferentially, *Phillips v. Dreher Shoe Co.*, 7 A. B. R. 326, 112 Fed. 404 (D. C. Penn.). See "Provable Debts," ante, §§ 642, 644.

62. *Smith v. Wheeler*, 5 A. B. R. 46, 55 App. Div. N. Y. 170. Under act of 1841, *Mace v. Wells*, 7 How. 27. Under act of 1867, *Hunt v. Taylor*, 108 Mass. 508.

63. *Obiter*, *In re Gerson*, 6 A. B. R. 11, 107 Fed. 897 (C. C. A. Penn., affirming 5 A. B. R. 89): This decision qualified the rule by limiting it by the proviso that it become such within the year limited for proving claims after adjudication. But it would seem that

the dischargeability should not be made dependent upon the liability becoming fixed and absolute within the year, thus making its dischargeability or nondischargeability dependent on an immaterial contingency. It is doubtful whether this decision states the correct rule. Only provable debts are discharged, and only those debts that were owing at the time of the filing of the petition are provable. Otherwise, where is the limitation? If debts that do not become absolutely owing until after the filing of the petition are provable when they do so become, then many incongruities and peculiar situations arise. Suppose one dividend has been declared and paid before the claim becomes "absolutely owing," will the claim be entitled to a second dividend—like belated claims in general? Suppose all the dividends have been paid out before the claim becomes "absolutely owing," is it to receive no dividend? Is there any reason why a claim becoming "absolutely owing" 364 days after the adjudication should be provable and be discharged whilst one becoming so 366 days afterward would not be discharged?

See ante, §§ 642, 644.

64. *Cohen v. Pecharsky*, 23 A. B. R. 754, 67 Misc. N. Y. 72.

65. *Dight v. Chapman*, 12 A. B. R. 743, 44 Ore. 265; inferentially, *In re Rouse*, 1 A. B. R. 231, 91 Fed. 514 (Pef. Ohio).

by the corporation's discharge.⁶⁶

SUBDIVISION "A."

PROVABLE DEBTS EXCEPTED BY STATUTE FROM THE OPERATION OF DISCHARGE.

§ 2743. **Debts Excepted from Discharge.**—Certain debts that are provable are nevertheless excepted from the operation of the discharge decree.⁶⁷

§ 2744. **Because Excepted, Not on That Account Entitled to Priority before Dividends.**—Provable claims excepted from discharge are not on that account entitled to priority of payment out of dividends.⁶⁸

§ 2745. **First Exception—Taxes Not Discharged.**—Taxes levied by the United States, the State, County, district or municipality in which the bankrupt resides, are not discharged.⁶⁹

There has been somewhat of a discussion as to whether a tax is a "debt" within the meaning of the Act. It is certainly a "demand" and therefore comes within the bankruptcy definition.⁷⁰

§ 2746. **Second Exception—"Liabilities for Obtaining Property by False Pretenses or False Representations," Not Discharged.**—Liabilities for obtaining property by false pretenses or false representations are excepted from the operation of discharge.⁷¹

This exception was added by the amendment of 1903, and took the place of the former provision that read: "Judgments for fraud or for obtaining property by false pretenses or false representation."

§ 2747. **Not All Frauds Excepted, but Only "Obtaining Property by False Pretenses," etc.**—Not all classes of fraud come under this section (although certain other frauds are excepted by a later provision if committed as an officer or in a fiduciary capacity) but only such frauds as are

66. *Elsbree v. Burt*, 9 A. B. R. 87, 24 R. I. 322.

67. Bankr. Act, § 17 (a).

68. *Claffin Dry Goods Co. v. Eason*, 2 A. B. R. 263 (Ref. Tex.).

69. Bankr. Act, § 17 (a).

70. Bankr. Act, § 1 (11). See ante, § 2160.

71. *Gaddy v. Witt*, 27 A. B. R. 457, — Tex. Civ. App. —; *Atlanta Skirt Mfg. Co. v. Jacobs*, 25 A. B. R. 895, 8 Ga. App. 299; *Orr Shoe Co. v. Upshaw & Powledge*, 30 A. B. R. 534, 13 Ga. App. 501; *Talcott v. Friend*, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills.), affirmed sub nom. *Friend v. Talcott*,

228 U. S. 27, 30 A. B. R. 31; *Standard Sew. Mach. Co. v. Kattell*, 22 A. B. R. 376, 132 App. Div. 539, 117 N. Y. Supp. 32; *Nichols v. Doak*, 22 A. B. R. 737, 48 Wash. 457 (although the case seems to recite the statute as it stood before the Amendment of 1903). Instance, false statement that check already mailed to buyer by customer which buyer would turn over to seller on receipt. *Rowell v. Ricker*, 18 A. B. R. 651, 79 Vt. 552.

Withdrawal of Objections to Discharge Based on Same Fraud, Not Res Judicata.—*Standard Sew. Mach. Co. v. Kattell*, 22 A. B. R. 376, 132 App. Div. 539, 117 N. Y. Supp. 32.

embraced within the term "obtaining property by false pretenses or false representations." The term is more restricted in respect to the classes of fraud embraced within its exceptions than was the law before the amendment of 1903, although broader in the other respect that judgment is not prerequisite.⁷²

Rudstrom v. Sheridan, 31 A. B. R. 862, 122 Minn. 262: "We assume, in the consideration of the question, that Congress intended the language of the statute to be understood in its ordinary signification, and that the purpose of the law was to prevent the bankrupt from retaining the benefits of property acquired by fraudulent means. In order, therefore, to bring the statute into operation, and prevent the full discharge of the bankrupt, it should be made to appear that property of some kind, tangible or intangible, was thus obtained by him. The mere fact that the liability arose in consequence of his fraud is not alone sufficient; the fraud must be followed and result in a loss of property to the creditor. The rule thus stated, which seems but an expression of the plain purpose of the statute, does not apply to the case at bar. Here plaintiff parted with no property or property right in reliance upon the alleged agreement of defendant to procure the indorsement of Swick. Defendant neither acquired any property, nor did plaintiff, if the statute be construed to cover such a case, part with any property right. The old notes, for which the new ones were given were not surrendered, the maker thereof was not released from liability, nor was the right to sue upon the old notes surrendered. The whole foundation of plaintiff's contention that the debt was not released by the discharge rests in the claim that defendant failed to perform an executory agreement to procure the signature of Swick. Clearly there was no 'obtaining of property' by false pretenses within the meaning of the statute."

Mackel v. Rochester, 14 A. B. R. 431, 135 Fed. 904 (D. C. Mont.): "The Amendment of 1903 to § 17 changed the nature of the debts included within the exceptions. * * * The difference, proper to be noticed in the present case, between the law as it stood prior to 1903 and as it is at present, rests in this: Before the amendment of 1903, the bankrupt was released from all provable debts except claims in actions for fraud or for obtaining property by false pretenses or false representations, which had been reduced to judgment, while now the exception includes liabilities for obtaining property under false pretenses or false representations; that is to say, before the present statute, a bankrupt might have been released unless a provable debt for fraud, as specified in subdivision

72. In re Nuttall, 29 A. B. R. 800, 201 Fed. 557 (D. C. N. Y.). Compare, In re Dunfee, 30 A. B. R. 721, 206 Fed. 745 (D. C. N. Y.).

Before 1903 Judgments for Any Kind of Fraud Excepted.—Before the amendment of 1903, a judgment for any fraud, as well for other frauds as for that of obtaining property by false pretenses or false representations, was excepted from the operation of the discharge decree. In re Bullis, 7 A. B. R. 238, 68 App. Div. N. Y. 508, affirmed by U. S. Sup. Ct. in *Bullis v. O'Beirne*, 13 A. B. R. 108, 195 U. S. 606.

But the fraud must have been actual fraud as distinguished from constructive fraud. *Bullis v. O'Beirne*, 13 A.

B. R. 108, 195 U. S. 606; *Burnham v. Pidcock*, 5 A. B. R. 42 (N. Y. Sup. Ct., affirmed in 5 A. B. R. 590); *Forsyth v. Wehmeyer*, 3 A. B. R. 807, 177 U. S. 177; *Mackel v. Rochester*, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.); *Western Union Cold Storage Co. v. Hurd*, 8 A. B. R. 633, 116 Fed. 442 (D. C. Mo.); *Cooper Grocery Co. v. Gaddy*, 27 A. B. R. 422, — Tex. Civ. App. —.

Claim of Surety Company for Payment upon Bankrupt's Default, Not Dischargeable.—*Gaddy v. Witt*, 27 A. B. R. 457, — Tex. Civ. App. —. Compare *quære* In re Dunfee, 30 A. B. R. 721, 206 Fed. 745 (D. C. N. Y.). See also, ante, § 2566, note 173.

2, was in judgment, while now he will not be released if the claim is merely upon a liability for fraud in obtaining property by false pretenses or false representations, whether or not such liability is reduced to judgment."

In re Thaw, 24 A. B. R. 759, 180 Fed. 419 (D. C. Pa. affirmed sub nom. Gleason v. Thaw, 25 A. B. R. 782, 185 Fed. 345, C. C. A.): "The mere fact that the gravamen of the complaint is fraud (not created while acting in a fiduciary capacity) will not prevent the operation of a discharge since the amendment of 1903, though formerly it would.

Thus, obtaining professional legal services under false pretenses is not the obtaining of "property" within the exception.⁷³

Gleason v. Thaw, 25 A. B. R. 782, 185 Fed. 345 (C. C. A. Pa.), affirming 24 A. B. R. 759, 180 Fed. 419: "The language used in the seventeenth section of the Bankruptcy Act, to which we have already referred, by which liabilities for obtaining property by false pretenses are exempted from the provable debts discharged in bankruptcy, are the usual and most general words for describing a specific crime. Their use in this connection dates back as far as the Statute of 30 George II, c. 34 (1757), and they have since then, so far as they define the crime, remained unchanged. 19 Cyc. 387. The same language, in substance, has been used in the statutes in this country, and where departed from, it is only by way of enumeration of certain kinds of property that may be included under the general designation. These enumerations all refer to substantive things—to a res—and in no case to which our attention has been called is anything included in the enumeration which approaches, in its description or definition, services rendered. Certainly under no proper and strict administration of the criminal law could any one be indicted under the general language of obtaining property under false pretenses, on the ground that services, whose performance has been induced by a false pretense, are property, within the meaning of the Act."

§ 2748. Judgment Not Requisite.—The right of action need not be reduced to judgment. Mere "liabilities" for obtaining property by false pretenses or false representations are excepted.⁷⁴

73. Gleason v. Thaw, 28 A. B. R. 473, 196 Fed. 359 (C. C. A. N. Y.). See, also, Gleason v. O'Mara, 24 A. B. R. 832, 180 Fed. 417 (C. C. A. La.).

74. Mackel v. Rochester, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.), § 2747.

Before 1903 Must Have Been Reduced to Judgment, Else Barred.—Before the amendment of 1903, the cause of action for fraud must have been reduced to judgment, else it was barred.

Crawford v. Burke, 12 A. B. R. 668, 195 U. S. 176: "The fact that the second subdivision of § 17 excepted from the discharge 'all judgments in actions for frauds, or of obtaining property by false pretenses, or false representations,' indicates quite clearly that as to frauds in general it was the intention of Congress only to except from discharge such as had been reduced to judgment, unless they fall within the fourth subdivision, of those

created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity."

In re Lewensohn, 3 A. B. R. 594, 98 Fed. 576 (D. C. N. Y.); Tindle v. Birkett, 15 A. B. R. 179, 171 N. Y. 520; In re Bullis, 7 A. B. R. 238, 171 N. Y. 689, affirmed in Bullis v. O'Beirne, 13 A. B. R. 108, 195 U. S. 606, 69 N. J. L. 487; Morse & Rogers v. Kaufman, 7 A. B. R. 549, 4 Va. Sup. Ct. Reporter 172; Smith & Wallace Co. v. Lambert, 11 A. B. R. 252, 69 N. J. L. 487; compare, obiter, In re Thomas, 1 A. B. R. 515, 103 Fed. 273 (D. C. Iowa); obiter, Brown & Adams v. Button Co., 17 A. B. R. 569, 149 Fed. 48 (C. C. A. Del.); In re Rhutassel, 2 A. B. R. 697, 96 Fed. 597 (D. C. Iowa); obiter, Howe v. Noyes, 15 A. B. R. 103, 47 N. Y. Misc. 338; contra, In re Wollock, 9 A. B. R. 685, 120 Fed. 516

And the decision in *Tindle v. Birkett*, 205 U. S. 183, 18 A. B. R. 121, no longer is applicable.⁷⁵

§ 2749. Judgment Not Such Merger as Prevents Inquiry into Original Liability.—Judgment does not so far work a merger that the original character of the liability cannot be inquired into.⁷⁶

(D. C. Ills.); contra, *In re Cole*, 5 A. B. R. 780 (D. C. N. Y.).

And whether the judgment were a judgment for fraud, obtaining property by false pretenses or false representations, or not, must have been gathered from the record itself. *Burnham v. Pidcock*, 5 A. B. R. 590, 58 N. Y. App. Div. 273, affirming 5 A. B. R. 42; also, *In re Rhutassel*, 2 A. B. R. 697, 96 Fed. 597 (D. C. Iowa).

Barnes Mfg. Co. v. Norden, 7 A. B. R. 553, 67 N. J. L. 493. "Judgment recovered on the common money counts is not excepted from the operation of a discharge in bankruptcy as a judgment in an action for fraud."

Smith & Wallace v. Lambert, 11 A. B. R. 252, 69 N. J. L. 487; *In re Arkell*, 6 A. B. R. 650, 65 N. Y. App. Div. 130; *Hargardine-McKittrick v. Hudson*, 6 A. B. R. 657 (D. C. Mo., affirmed in 10 A. B. R. 225, 122 Fed. 232, C. C. A.).

But the judgment need not have expressly read that it was rendered on those grounds; the fact might be ascertained from an inspection of the entire record.

In re Bullis, 7 A. B. R. 238, 68 N. Y. App. Div. 508, affirmed in *Bullis v. O'Beirne*, 13 A. B. R. 108, 195 U. S. 606. Compare, to same effect under law of 1867, *Packer v. Whittier*, 1 A. B. R. 621 (C. C. A. Mass.).

And the recitals of its character contained in the judgment record were not conclusive on the federal court.

Analogously, *Knott v. Putnam*, 6 A. B. R. 80, 107 Fed. 907 (D. C. Vt.); Where the court in substance held, where in an action in a state court upon such a debt the judgment recites that "the sum of which this judgment was rendered was received, and held by the defendants in a fiduciary capacity for the plaintiff," and "that the cause of action arose from the willful and malicious act of the defendants, and that they ought to be confined in close jail," this decision is conclusive in a court of bankruptcy only as to the matters before the state court for decision, including whether he was entitled to a close jail certificate under the state statutes, but does not affect the right of the bankruptcy court to determine whether execution awarded

with the certificate upon it should be used for imprisoning the bankrupts to compel payment, and the bankruptcy court has jurisdiction and authority to stay the arrest of the bankrupts upon such execution.

But compare, *In re Arkell*, 6 A. B. R. 650, 65 N. Y. App. Div. 130.

And compare, *Hargardine-McKittrick Dry Goods Co. v. Hudson*, 6 A. B. R. 657, 122 Fed. 232 (D. C. Mo., affirmed in 10 A. B. R. 225, C. C. A.).

But the fraud must have been the gravamen of the action and proof of the fraud must have been essential to the recovery and it was not sufficient that the fraud was merely incidentally shown. *Collins v. McWalters*, 6 A. B. R. 595, 35 N. Y. Misc. 648; *Burnham v. Pidcock*, 5 A. B. R. 590, 68 N. Y. Supp. 1007.

And a stipulation that the judgment should be confined in its construction to a money judgment rendered it dischargeable. *In re Arkell*, 6 A. B. R. 650, 65 N. Y. App. Div. 130. Analogously, *Hargardine-McKittrick Dry Goods Co. v. Hudson*, 6 A. B. R. 657, 122 Fed. 232 (D. C. Mo., affirmed in 10 A. B. R. 225, C. C. A.).

And where the creditor had an option to sue upon contract or to waive the contract and sue for fraud and elected the former method of procedure, the debt was not one created by fraud; a fortiori, *In re Rhutassel*, 2 A. B. R. 697, 96 Fed. 597 (D. C. Iowa).

In re Lawrence, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.); obiter, *Maxwell v. Martin*, 22 A. B. R. 93, 130 App. Div. N. Y. 80. But compare, *In re Benoit*, 20 A. B. R. 270, 108 N. Y. Supp. 889.

75. *In re Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.).

76. Obiter, *Mackel v. Rochester*, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.); obiter, being as to law before 1903, *McDonald v. Brown*, 10 A. B. R. 63, 23 R. I. 546; compare, to this effect under law of 1867, *Packer v. Whittier*, 1 A. B. R. 621 (C. C. A. Mass.).

Analogously, *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.). But compare, *In re Benoit*, 20 A. B. R. 270, 108 N. Y. Supp. 889; compare, *Strauch v. Flynn*, 22 A. B. R.

Whilst it is true that a judgment does not effect such a merger as to prevent inquiry into the original character of the liability so as to bring it within the class of those liabilities which are not discharged, yet judgment may operate as *res adjudicata* upon the nature of the obligation where the issues were the same.⁷⁷

§ 2750. How, Where Tort Waived and Judgment on Quasi Contract.—Whether the form of the action as, where the tort is waived and suit brought *ex contractu*, prevents inquiry into the original character of the liability, is not fully settled.⁷⁸

It appears, at any rate, that laches in asserting the fraudulent origin of the debt may be considered in determining the nature of it.⁷⁹

§ 2750½. Proving Claim in Bankruptcy Not Waiver of Exception.—Proving the claim in bankruptcy as a debt for sharing in the dividends is not a waiver of the creditor's right to urge that the debt is not dischargeable.⁸⁰

Friend v. Talcott, 228 U. S. 27, 30 A. B. R. 31: "It is urged that an election and waiver resulted from the act of the debtor in proving his claim as on contract, and thus taking advantage of the bankruptcy proceedings, and thereby obtaining rights or benefits which he would not have had if he had stayed out and thus saved his right to be freed from the operation of the discharge. But this distinction is also wholly without foundation. Its error lies in assuming that the right which the Bankruptcy Act confers upon enumerated classes of debts to be exempt from the operation of a discharge rests upon the conception that such debts are exempt because they are excluded from the act, and may not participate in the distribution of assets. That is to say, the confusion lies in not distinguishing between creditors who are excluded from the Bankruptcy Act and those who, although included therein, have had conferred upon them the benefit of an exception from the operation of the discharge. Even a superficial analysis of the text of the Bankruptcy Act will make this clear. Thus, § 63a and b enumerates the debts which may be proved, and which are therefore entitled to participate in the benefits of the act and are bound by its provisions, including a discharge. Section 17 enumerates the debts not affected by a discharge; that is, those exempted from its operation. It is apparent that the exemptions do not rest upon any theory of the exclusion of the creditor from the Bankruptcy Act, or of deprivation of right to participate in the distribution, but

246, 122 N. W. 320, 108 Minn. 313; compare, *Nichols v. Doak*, 22 A. B. R. 737, 48 Wash. 457.

Instance, *Hallagan v. Dowell*, 31 A. B. R. 848, — Iowa —. Compare post, § 2754¼ and § 2790.

77. *Peters v. United States ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing *United States ex rel. Kelly v. Peters*, 22 A. B. R. 177, 166 Fed. 613); *Chambers v. Kirk*, 32 A. B. R. 175, — Okla. —.

78. *Mackel v. Rochester*, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.); *Karger v. Orth*, 27 A. B. R. 212, 116 Minn. 124. Compare, *Strauch v. Flynn*, 22 A.

B. R. 246, 122 N. W. 320, 108 Minn. 313; also compare, *In re Benoit*, 20 A. B. R. 270, 108 N. Y. Supp. 889. Also compare, *In re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.); compare, *Mackel v. Rochester*, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.).

79. Compare, analogously, *Hargardine-McKittrick Co. v. Hudson*, 10 A. B. R. 225, 122 Fed. 232 (C. C. A. Mo.).

80. *Orr Shoe Co. v. Upshaw & Powledge*, 30 A. B. R. 534, 13 Ga. App. 501; *Brown v. Hannagan*, 27 A. B. R. 294, 210 Mass. 246.

solely on the ground that, although such rights are enjoyed, an exemption from the effect of the discharge is superadded."

Standard Sewing Mach. Co. v. Kattell, 22 A. B. R. 376, 132 App. Div. 539, 117 N. Y. Supp. 32: "It can not be claimed that plaintiff has elected to waive the fraud and rely upon the contract indebtedness. Being a claim upon account, it was by the statute one which was provable in bankruptcy under § 63 of the Bankruptcy Act. By § 17 of that act of discharge in bankruptcy does not relieve a defendant from all his provable debts, nor does it relieve him from a liability 'for obtaining property by false pretenses or false representations.' Attention is called to the provisions of § 33 of the Bankruptcy Act of 1867, which provided that no debt created by fraud of the bankrupt should be discharged, 'but the debt may be proved and the dividend thereon shall be a payment on account of said debt.' This provision was left out of the present Bankruptcy Act. Notwithstanding that fact, however, it has been held that under the present Bankruptcy Act, the proof of a debt in bankruptcy proceedings is not such an election as waives the right to proceed to recover the same debt as created by fraud and not discharged by the Bankruptcy Act. *Frey v. Torrey*, 8 Am. B. R. 196, 70 App. Div. 166, 75 N. Y. Supp. 40, affirmed in 175 N. Y. 501. While this case was overruled as to a construction of one part of the statute in *Crawford v. Burke*, 195 U. S. 186, 12 Am. B. R. 659, this authority has never been questioned upon the proposition to which it is here cited, and by the amendment of the Bankruptcy Act in 1903 the holding in *Crawford v. Burke* has been made immaterial."

§ 2750¾. Unsuccessful Opposition to Discharge for False Statement Whether Res Judicata That Debt Not on False Pretenses.—An unsuccessful opposition to a discharge or composition on the ground of a false statement in writing is not res judicata that the same creditor's debt is not one founded upon false pretenses and hence excepted from the operation of discharge.

Friend v. Talcott, 228 U. S. 27, 30 A. B. R. 31: "While the considerations just stated [see further quotations from this case at § 2750½] dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to res judicata, that is a confusion of thought arising from treating things which are different as one and the same. To constitute res judicata, it is elementary that there must be identity of cause between the two cases. In view of the text of the Bankruptcy Law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge, it needs but statement to demonstrate the difference of cause which necessarily obtains between determining, on the one hand, in favor of the bankrupt, whether he is entitled to a general discharge, and of deciding, on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge, and the question after it is granted, whether a particular debt is exempted by law from its operation—than does the provision of the statute (§ 14c) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge.' It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as res judicata in the complete sense, that decree

was necessarily binding in so far as it established relevant facts which were at issue between the parties, and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition.

"On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge are the facts which were conceded to exist, and were not traversed for the purpose of the hearing on the composition. Conceding, for the sake of argument, that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case."

§ 2751. False Representations Not Necessarily in Writing.—The false representations need not necessarily have been made in writing in order to except the debt from the discharge.⁸¹

Obiter, *Katzenstein v. Reid*, 16 A. B. R. 746, 41 Tex. Civ. App. 106: "There is no requirement in amended § 17 as to the manner in which the false pretenses or false representations shall be conveyed to the defrauded party, and we do not believe that the national legislature intended that a requirement that such pretenses or representations should be in writing should be read from § 14 into § 17. In the first section it is provided that the bankrupt shall not be discharged if he has obtained property on credit upon a materially false statement in writing made to the person defrauded for the purpose of obtaining such property on credit; but in § 17 it provides that such discharge will not release the bankrupt from liabilities for obtaining property under false pretenses. The two provisions are not antagonistic, and there is no warrant for reading one into the other."

But may be in writing; and, indeed, may be the same writing on which a previous unsuccessful opposition to the discharge of the bankrupt was based.

Talcott v. Friend, 24 A. B. R. 708, 179 Fed. 676 (C. C. A. Ills., affirmed sub nom. *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31): "Furthermore, if § 14 b (3) were to be interpolated into § 17 (2) Congress would be held to have intended the absurdity that deceivers, despite their discharges, should remain liable for oral deceits although excused from written deceits."

§ 2752. False Representations to Mercantile Agency Sufficient.—The false representations need not have been made to the particular creditor now seeking to have his debt excepted. If made to a mercantile agency to obtain credit it will suffice.⁸²

§ 2753. Reckless Representations Sufficient.—Reckless representations made by a buyer, who, although having opportunity to find out the

⁸¹. Instance, *Rowell v. Ricker*, 18 A. B. R. 651, 79 Vt. 552. Compare *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31.

⁸². *Katzenstein v. Reid*, 16 A. B. R.

truth, did not actually know the falsity, will suffice to except the debt.⁸³

§ 2753½. False Representations Made Afterwards, Insufficient.—The false pretenses or representations must have been made at or before the time of the arising of the liability, and subsequent misrepresentations will not suffice.⁸⁴

§ 2754. Third Exception—Liabilities for Willful and Malicious Injuries to Person or Property.—Liabilities for willful and malicious injuries to the person or property of another constitute the third exception. They are not discharged.⁸⁵

It is to be noted in this connection that such claims are, in general, not provable, and hence would not be dischargeable (unless in judgment), even if not specially excepted by the statute,⁸⁶ except such of them as could be proved in contract by the waiving of the tort; therefore, the amendment of 1903 added little to the exception of willful and malicious injuries to person or property, for, before that amendment, liabilities for willful and malicious injuries to the person or property of another were not provable debts and were therefore, even then, not discharged, except in cases wherein the tort could be waived and suit be brought on contract. Of course, judgments, however, would have been then discharged had it not been for the exceptions of § 17.

Thus, in general, judgments for assault and battery are not released.⁸⁷

Full faith and credit are to be given to a judgment of a State court as to whether a liability is "for willful or malicious injury to person or property;"^{87a} and in one instance where judgment had been recovered against a school teacher for assault, the reviewing court reversed the lower court, which had held it had the right to determine whether the assault was "will-

83. *Katzenstein v. Reid*, 16 A. B. R. 746, 41 Tex. Civ. App. 106.

84. *Gleason v. O'Mara*, 24 A. B. R. 832, 180 Fed. 417 (C. C. A. Pa.).

85. Bankr. Act, § 17 (a) (2).

Judgment on a recognizance partakes of nature of original cause of action.—Judgment on a recognizance that had been entered into by one who took the poor debtor's oath after arrest on a judgment for assault, is not released by discharge. In re Colacula, 13 A. B. R. 292, 133 Fed. 255 (D. C. Mass.). But compare analogously, In re Elumberg, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.).

Before 1903 Must Have Been Reduced to Judgment, Else Released.—Before the amendment of 1893 the right of action must have been reduced to judgment else it was released unless it was not one of those torts which could be waived and be presented as a claim quasi ex contractu. *Morse & Rogers v. Kaufman*, 7 A. B.

R. 549, 4 Va. Sup. Ct. 172. See ante, § 2748, note.

Before 1903 Character of Judgment Must Have Appeared from Face of Record.—Before the amendment of 1903 the character of the obligation must have appeared from the record itself; it must have been a judgment for willful or malicious injury. Inferentially, In re Carmichael, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa). See ante, § 2748, note.

Johnson v. Bruckheimer, 22 A. B. R. 88, 63 Misc. (N. Y.) 248; *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.).

86. See ante, "Claims ex Delicto," §§ 635, 636.

87. *McChristal v. Clisbee*, 16 A. B. R. 838, 190 Mass. 120; In re Colacula, 13 A. B. R. 292, 133 Fed. 255 (D. C. Mass.).

87a. *Peters v. United States ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing *United States ex rel. Kelly v. Peters*, 22 A. B. R. 177, 166 Fed. 613).

ful and malicious," and it declared the judgment of the State court to be binding as to the nature of the liability, where such nature had been explicitly put in issue or been necessarily involved, and that, in pursuance of such construction, the debt in this case was not discharged.⁸⁸

Again, judgments for criminal conversation are not released.⁸⁹

Likewise, judgments for breach of contract of marriage, where accompanied with seduction, are not released;⁹⁰ nor are judgments for alienation of affections;⁹¹ nor judgments for the seduction of a daughter;⁹² nor judgments for libel⁹³ or slander.⁹⁴

But the liability must have been for willful and malicious injury; and the "malice" must be actual;⁹⁵ and a judgment against a landlord for damages for the bite of a vicious dog kept by a tenant therefore has been held dischargeable;⁹⁶ likewise, a judgment for false imprisonment has been held released, there having been no allegation in the complaint that it was malicious, and malice not being essential.⁹⁷

But a judgment for forcible entry and detainer will not be discharged where the facts are such as to warrant the implication of malice as a matter of law.⁹⁸ However, actual malice is made out within the meaning of § 17 (a) 2, where the act is shown to have been an intentional and wrongful act, and without just cause or excuse.⁹⁹

The exception is based upon the "liability," and the actual facts will govern, though the pleadings may be only for the negligent performance of work, as in the case of a surgeon,¹⁰⁰ or though the liability be "merged" in a judgment.¹

88. *Peters v. United States ex rel. Kelley*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills., reversing *United States ex rel. Kelly v. Peters*, 22 A. B. R. 177, 166 Fed. 613).

89. *Tinker v. Colwell*, 11 A. B. R. 568, 193 U. S. 473 (affirming 6 A. B. R. 434, 169 N. Y. 531); a case arising before the amendment of 1903 added by express words liabilities for criminal conversation.

90. *Distler v. McCauley*, 6 A. B. R. 491, 66 N. Y. App. Div. 42.

91. *Leicester v. Hoadley*, 9 A. B. R. 318, 66 Kans. 172.

92. *In re Friche*, 6 A. B. R. (D. C. N. J.): This was a case arising before the amendment of 1903 added, by express words, liabilities for the seduction of unmarried females.

Contra, *In re Sullivan*, 2 A. B. R. 30 (Ref. N. Y., distinguished in *In re Smith*, 3 A. B. R. 78).

93. *McDonald v. Brown*, 10 A. B. R. 58, 23 R. I. 546; *Nat'l Surety Co. v. Medlock*, 19 A. B. R. 654, 58 S. E. 1131, 2 Ga. App. 665; *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.).

94. *In re Dowie*, 29 A. B. R. 338, 202

Fed. 816 (D. C. N. Y.); point conceded, *Drake v. Vernon*, 25 A. B. R. 69 (Sup. Ct. S. D.).

95. *Flanders v. Mullin*, 18 A. B. R. 708, 80 Vt. 124.

96. *In re Lorde*, 16 A. B. R. 200, 144 Fed. 320 (D. C. N. Y.).

97. *Johnson v. Bruckheimer*, 22 A. B. R. 242, — N. Y. App. Div. —, reversing same case, 22 A. B. R. 88.

98. *In re Munro*, 28 A. B. R. 664, 195 Fed. 817 (D. C. N. Y.).

99. *Tinker v. Colwell*, 193 U. S. 473, 11 A. B. R. 568; *Kavanaugh v. McIntyre*, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987 (aff'd S. C., 31 A. B. R. 712, 210 N. Y. 175); *Peters v. United States ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills.); *In re Halper*, 31 A. B. R. 283 (N. Y. City Ct.); *In re Munroe*, 28 A. B. R. 369, 195 Fed. 817 (D. C. N. Y.); compare *Heteshue v. Jones*, 28 A. B. R. 854 (Com. Pl. Pa.).

100. *Flanders v. Mullin*, 18 A. B. R. 708, 80 Vt. 124.

1. *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.). Obiter, *Peters v. United States ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills.). See ante, § 2740.

Obiter, *Peters v. United States ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills., reversing *ex rel. Kelly v. Peters*, 22 A. B. R. 177, 166 Fed. 613 (D. C.)): "The character of the 'liability' as that word is used in amended § 17 (2) of the Bankruptcy Act, is not changed by the fact that the liability was reduced to judgment."

It has been held, though by a divided court, that a judgment against a saloonkeeper in favor of the administratrix of a man to whom the saloonkeeper had sold whiskey in excess and had then given chloral to quiet him, and had thus killed him, was not a wilful nor malicious injury within the exception from discharge in bankruptcy.²

§ 2754½. **Willful Conversion Constituting "Liability for Willful and Malicious Injury to Property."**—Willful and wanton conversion of property may constitute a willful and malicious injury to property of another, the debt for which is not discharged in bankruptcy. Thus, it has been held by the Court of Appeals of New York, that the willful selling of a customer's stock by a bankrupt stockbroker comes within this exception.

Kavanaugh v. McIntyre, 31 A. B. R. 712, 210 N. Y. 175, affirming *Kavanaugh v. McIntyre*, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987: "The firm of T. A. McIntyre & Co. received the stock and script on February 5, 1908, under circumstances which gave them no right without the knowledge and consent of the plaintiff to sell the securities and retain the avails thereof. Yet, being at that time in financial straits, they began the very next day to sell the stock and script, and within a brief period all had been disposed of. It is very significant that the defendants against whom the judgment was rendered went on the witness stand but made no attempt to justify or excuse the acts of the firm. These facts show that the conversion of the stock and script was not merely technical nor committed in the assertion of a mistaken claim to the property. It was a wrongful act done intentionally without just cause or excuse, and constituted willful and malicious injury to the plaintiff's property as those words are used in § 17 of the Bankruptcy Act.

"Counsel for the defendant argue that the construction here given renders § 17 tautological, and that is true to some extent. Prior to the amendment of 1903, subdivision 2 of § 17 excepted in general terms from the effect of a discharge in bankruptcy judgments in actions for willful and malicious injuries to the property of another, while subdivision 4 excepted specifically debts created by the bankrupt's frauds while acting in a trust capacity. The difference in the main between these sub-divisions was that number 2 applied only to debts reduced to judgment, while number 4 applied to the debts particularly enumerated, whether reduced to judgment or not. This distinction was struck out by the amendment of 1903, and some overlapping must occur. Some cases will fall within both subdivisions. But that is not a reason for limiting the words 'willful and malicious injury to property' contained in subdivision 2. The classification made originally by § 17 has been somewhat disarranged but the meaning of the section is plain enough.

"In *Crawford v. Burke*, 195 U. S. 176, 12 A. B. R. 659, a case upon which

2. *Tomkins as Administratrix v. Williams*, 23 A. B. R. 886, 137 App. Div. N. Y. 521.

the defendants rely, it was held that a broker carrying stocks on margin who sells the same and does not pay over the proceeds to his principal, is not indebted in a fiduciary capacity within the Bankruptcy Act, and consequently the defendant was relieved from liability by his discharge. To the same effect is *Tindle v. Birkett*, 183 N. Y. 267, 15 A. B. R. 179, 205 U. S. 183, 18 A. B. R. 121.

"These decisions were based on subdivision 4 of section 17 and had reference to discharges granted prior to the amendment of 1903. They have no application to the case at bar which falls within the provisions of subdivision 2 of section 17, as amended in that year, and does not involve the question whether the defendants were acting as officers or in a fiduciary capacity. There has been no authoritative holding contrary to the views herein expressed since the amendment of 1903."

On the other hand, in a case wherein the facts were almost identical, the United States District Court for the Southern District of New York criticized and refused to follow the ruling of the state court (before, however, the same had been affirmed by the appellate court), holding that the injury to property contemplated in the bankruptcy act was actual physical injury to the subject matter.⁶

In *re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.): "Prior to 1903, his case would have come squarely within the rule of *Crawford v. Burke*, 195 U. S. 176, 12 A. B. R. 659, and *Tindle v. Birkitt*, 205 U. S. 183, 18 A. B. R. 121, and the question is whether the amendment of 1903 changed the law as there laid down. That amendment so far as here material, changed subdivision 2 so that, instead of excepting judgments for fraud, obtaining property under false pretenses or representations, or for malicious injuries to person or property, it excepted liabilities for obtaining property under false pretenses or representations or willful injuries to person or property. As I have already shown, Roche can not claim here for fraud, because he has affirmed his purchase by suing for conversion. It is true that under *Bullis v. O'Beirne*, 195 U. S. 606, 13 A. B. R. 108, the form of the complaint is not conclusive; but the trouble here is that the action is not brought for fraud at all, but for conversion of a title obtained through the very fraud on which the victim now seeks to rely. Having with full knowledge of the fraud, sued for the value of the stock, he can no longer as a matter of law rely upon the fraud. He is therefore relegated to the second part of subdivision 2, which excepts liabilities for malicious injury to property. The only injury to his property rights considered is its conversion, and if that be a 'malicious injury' to his property so is every fraud or embezzlement, and the earlier part of subdivision 2, as well as the whole of subdivision 4, is merely elaborate tautology. This cannot be the correct meaning of the words. Injury to person and property means causing damage to the subject-matter of the rights, not depriving the owner of them. It is so used generally in the law, and *Tinker v. Colwell*, 193 U. S. 473, 11 A. B. R. 568 is no exception to the rule, because the theory was, not that the husband is deprived of his rights in his wife, but that her seduction is an actual assault upon her person.

"No doubt it is hard to think of any claim which would at once be provable and also a liability for such injuries, unless it be a judgment for them. Still it may be that the clause might cover such claims as at once arose from injury to

6. Compare *In re Toklas Brothers*, 29 A. B. R. 709, 201 Fed. 377 (D. C. N. Y.).

the subject-matter of property and resulted in such profit to the wrongdoer as permitted an action on the common counts. Be that as it may, I can not interpret those words in a way so entirely at variance with their traditional meaning as to cover willful conversion merely because I am uncertain whether they really cover any other cases than they did prior to 1903. * * * *Kavanaugh v. McIntyre*, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987 undoubtedly bears out the petitioner here, but it is not an authority binding upon me, and I regret that I can not assent to its reasoning."

However, the case of *Kavanaugh v. McIntyre*, *supra*, has been approved and followed by other courts, including the United States District Court for the Western District of New York.⁷

In *re Vincenzo Arnao*, 32 A. B. R. 88, 210 Fed. 395 (D. C. N. Y.): "In *Crawford v. Burke*, 195 U. S. 176, 12 A. B. R. 659, the Supreme Court decided that a broker carrying stocks on margins who sells the same and does not pay over the proceeds to his principal is not indebted to the latter in a fiduciary capacity under § 17(4) of the Bankruptcy Act, and that such a liability arises under § 63 relating to provableness of a claim founded upon an open account or upon a contract express or implied. Subsequent to this decision § 17 (2) of the Bankruptcy Act was amended to provide that a discharge in bankruptcy releases a bankrupt from his provable debts, except such as 'are liabilities for obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another.'

"In the case at bar the inquiry must be as to whether the judgment recovered by the plaintiff was for willful or malicious injury to the person or property of another. Upon this point the doctrine of *Kavanaugh v. McIntyre*, 128 App. Div. 722, 21 Am. B. R. 327, 112 N. Y. Supp. 987, is thought to be apposite. After defining the words 'malice' and 'willful,' the Appellate Division, Justice Cochrane writing the opinion, says:

"There are doubtless many torts against which a discharge in bankruptcy is effective. The act is liberally construed in favor of an honest and well-meaning debtor. A conversion of property may exist entirely consistent with the utmost good faith on the part of the converting debtor. In respect to such torts there is no injustice or inequity in extending the provisions of the Bankruptcy Act applicable thereto in accordance with the beneficent and humane policy of such act. But a conversion which shows a design or willingness to inflict a wrong upon another or the reckless disregard of the rights of another rests on a different basis."

"And it was held that, where the bankrupt was liable to pay a debt which arose from his dishonest acts, his discharge was barred. "My view as to the interpretation of § 17 (2) accords with the views expressed in the *Kavanaugh* case, and I believe that the facts here indisputably show that the wrongful acts of the bankrupt were practically larcenous. The decisions of *In re Adler* (C. C. A., 2d Cir.), 18 Am. B. R. 240, 144 Fed. 659, cited by bankrupt, does not cover the point under consideration. There it was held by the Circuit Court of Appeals for the Second Circuit that the acts of the bankrupt were constructively fraudulent, although they were not executed by the bankrupt while

7. See, also, *Kavanaugh v. McIntyre*, 27 A. B. R. 279 (Sup. Ct. N. Y.); compare on principle that it is not necessary that there be actual injury to

the specific property, *In re Munro*, 28 A. B. R. 664, 195 Fed. 817 (D. C. N. Y.).

acting in a fiduciary capacity within the meaning of § 17 (4). Section 17 (2) was not under discussion.

"In re Cole (D. C., N. Y.), 5 Am. B. R. 780, 106 Fed. 837, decided by this court in the year 1901, also cited by counsel for the bankrupt in support of the contention that a judgment for conversion is dischargeable, it was substantially held that an action in the State court brought to establish the liability of the bankrupt under § 17 (2) would not be enjoined, and such decision as I read it is not at all in conflict with the Kavanaugh case.

"It will not be necessary to advert to any of the other cases cited by the bankrupt, for their bases of facts are essentially different, and they were apparently decided either under § 17 (4), or before the amendment of § 17 (2) and its interpretation in the Kavanaugh case. In the latter case at the end of the opinion it is true the court said that the question was 'novel and not free from doubt,' and I am informed that the case has been taken to the Court of Appeals of this State, where it will be decided in the near future; still, as the question was carefully examined by the Appellate Division for the Third Department, and as there are no controlling federal decisions or none that so well cover the ground, I am persuaded to follow it."

Hallagan v. Dowell, 31 A. B. R. 848, — Iowa —: "The remaining question, therefore, is whether the wrongful and fraudulent appropriation of the property of another is a "willful and malicious injury" to such property. We had occasion, however, to pass upon it in *Bever v. Swecker*, 138 Iowa 721, 115 N. W. 704, and held to the affirmative of the proposition. Reference may be had to such case for the discussion of the question, and we need not repeat it. This conclusion renders it unnecessary that we consider whether the element of fraud shown was of such a nature as to render the debt dischargeable within the contemplation of § 17 (as amended February 5, 1903) of the Bankruptcy Act."

And, where the conversion is committed by one member of a partnership, without the knowledge of the other members, but in the usual course of partnership business, discharge will be denied to all.

Kavanaugh v. McIntyre, 31 A. B. R. 712, 210 N. Y. 175 (affirming S. C., 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987):

"It is also argued on behalf of the defendants that they did not actually participate in the injury done to the plaintiff's property, and that the wrongful acts were committed by other members of the firm. The individual members of a copartnership are civilly liable for torts of which they have no knowledge committed by any member of the firm in the course of the partnership business. In re Peck, 206 N. Y. 55; *Castle v. Bullard*, 64 U. S. 172. The case is, therefore, precisely within the words of section 17 subdivision 2, of the Bankruptcy Act, defining debts which are not released by the discharge in bankruptcy. The words are: 'A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * are liabilities * * * for willful and malicious injuries to the person or property of another.'

"If the defendants are civilly liable for the acts of other members of the firm, which amount to a willful and malicious injury to the property of the plaintiff, that ends the argument. They are not released by the discharge in bankruptcy, no matter whether they participated in the acts which cause the injury or not. *Strang v. Brader*, 114 U. S. 555, is directly in point."

§ 2754½. Judgment of State Court, How Far Res Judicata, or Merger.—It has been held that a judgment may be res adjudicata as to

whether or not the liability was one for "wilful or malicious injury to person or property;" and that the State court's ruling on the nature of the liability, as established by the judgment, will be adopted.⁸

From the trend of the decisions it would seem that the original nature of the liability is only a subject of outside proof where the record of the judgment is ambiguous or silent, or where such nature of liability is not necessarily involved in the issues.⁹

§ 2755. Fourth Exception—Liabilities for Alimony.—Liabilities for alimony already due or to become due, are not discharged.¹⁰

And a former decree of alimony obtained in one state is not discharged and merged in a new judgment recovered thereon in another state so as to render it a mere money judgment dischargeable in bankruptcy. The new judgment will not be discharged in bankruptcy so long as the original decree upon which it is founded remains in full force as a liability for alimony.

In *re Williams et al.*, 31 A. B. R. 717, 208 N. Y. 32, affirming S. C., 152 App. Div. 385, reversing *In re Williams Estate*, 23 A. B. R. 394, 118 N. Y. Supp. 562: "In the proceeding now before us, assuming that the surrogate had power to pass upon the question whether the respondent's claim had been discharged by the bankruptcy proceeding, the facts were before the court, and looking beneath the judgments it appears that the foundation upon which the respondent's claim rests is the alimony decreed by the South Dakota court to be paid by the testator to the respondent. The alimony was due in the form of a judgment entered in the legal method of enforcing the testator's obligation. Even if we give to the appellant's argument all the force and effect that he claims for it, the judgment rendered in South Dakota was not discharged by the decree in bankruptcy. The inconsistent and absurd results that would arise from holding that the New York judgment was discharged by the decree in bankruptcy, while the South Dakota judgment remained in full force and effect, require that the New York judgment should not be discharged unless the South Dakota judgment upon which it is founded is at the same time discharged.

"A decree in bankruptcy proceedings should not be held to be a discharge of a judgment in one State unless it at the same time is held to be a discharge of any and all judgments of other States, which are founded primarily upon the same debt or duty and which have such a relation to each other that a payment of one would result in a defense to or extinguishment of the others."

§ 2756. Simply Declaratory of Law as Already Existing.—This exception, added by the amendment of 1903, is simply declaratory of the law as it stood beforehand; for it was already the holding that such liabilities

8. *Peters v. United States ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills., reversing *United States ex rel. Kelley v. Peters*, 22 A. B. R. 177). *Chambers v. Kirk*, 32 A. B. R. 175, — Okla. —.

9. Compare *Hallagan v. Dowell*, 31 A. B. R. 848, — Iowa —. See also, ante, § 2749, and post, § 2790.

10. *Bankr. Act*, § 17 (a) (2). *Craine v. Craine*, 19 A. B. R. 76; *Maier v. Maier*, 28 A. B. R. 856 (Sup. Ct. N. Y.); *In re Williams et al.*, 31 A. B. R. 717, 208 N. Y. 32, affirming S. C., 152 App. Div. 385, reversing *In re Williams Estate*, 23 A. B. R. 394, 118 N. Y. Supp. 562.

were in the nature of demands of the state, and were not provable, and hence were not dischargeable.¹¹

§ 2757. Fifth Exception—Support of Wife or Child.—Liabilities of the bankrupt for the maintenance or support of a wife or child are not discharged.¹²

§ 2758. Simply Declaratory of Law as Already Existing.—This exception is simply declaratory of the law as it stood before the amendment of 1903; for before that time such liabilities were held to be in the nature of police regulations, and not to be provable debts, and hence not to be discharged.¹³

§ 2759. Liabilities to Third Parties Not Excepted—Only Liabilities Directly to Wife or Child.—This provision does not refer to liabilities to third parties for furnishing maintenance or support to the wife or child, but merely direct liabilities to themselves for maintenance or support.¹⁴

In *re Ostrander*, 15 A. B. R. 96, 139 Fed. 592 (D. C. N. Y.): "It is considered that the words of § 17a, cl. 2, Bankruptcy Act, * * * 'for maintenance or support of wife or child,' do not refer to a debt incurred for the services of a physician called by the husband to attend the wife while she is in normal relation to her husband. If so, a person supplying goods for a wife or child or rendering a service necessary for the support or maintenance, at the request of the husband, without delinquency on his part, would be beyond the scope of the act. The grocer, the market-man, clothiers of all descriptions, physicians, dentists, in fact all who, by service or sale, contributed to the support of the family, and thereby to the support of a wife or child would have claims not dischargeable under the act. The provision has probable application to cases where the person applying for discharge from his debts had so betrayed his moral and legal duty as a husband or parent that another was justified in providing the maintenance and support denied by the one upon whom the law places the primary duty. Without attempting to define the limits of the section, it is held that it does not apply to medical attendance furnished upon the express or implied contract of the husband or parent to pay therefor while the recipient is a member of the family, and while there is no breach of duty

11. *Wetmore v. Wetmore*, 13 A. B. R. 1, 196 U. S. 68; compare, *Arrington v. Arrington*, 13 A. B. R. 89, 132 Fed. 200 (D. C. N. Car.); *Audubon v. Shufeldt*, 5 A. B. R. 829, 181 U. S. 575; *Young v. Young*, 7 A. B. R. 171 (Sup. Ct. N. Y.); *Turner v. Turner*, 6 A. B. R. 289, 108 Fed. 785 (D. C. Ind.); *Maisner v. Maisner*, 6 A. B. R. 295, 62 N. Y. App. 286; In *re Shepard*, 5 A. B. R. 857, 97 Fed. 187 (D. C. N. Y.); In *re Anderson*, 5 A. B. R. 858 (D. C. N. Y.); In *re Williams, et al.*, 31 A. B. R. 717, 208 N. Y. 32, affirming S. C., 152 App. Div. 385, reversing In *re Williams Estate*, 23 A. B. R. 394, 118 N.

Y. Supp. 562; *Maier v. Maier*, 28 A. B. R. 856 (N. Y. Sup. Ct.).

Contra, *Fite v. Fite*, 5 A. B. R. 461 (Ky.), 61 S. W. 26, wherein alimony accruing before bankruptcy was held dischargeable. Compare contra, *Arrington v. Arrington*, 10 A. B. R. 103, 102 N. Car. 491, cited in *Arrington v. Arrington*, 13 A. B. R. 89, 132 Fed. 200 (D. C. N. Car.).

12. Bankr. Act, § 17 (a) (2).

13. In *re Hubbard*, 3 A. B. R. 528, 98 Fed. 710 (D. C. Ills.); In *re Baker*, 3 A. B. R. 101, 96 Fed. 964 (D. C. Kans.).

14. *Schellenberg v. Mullaney*, 16 A. B. R. 542, 112 App. Div. (N. Y.) 384.

on the part of the person contracting the debt toward the one receiving the service."

§ 2760. Sixth Exception—Seduction or Criminal Conversation.—Liabilities for the seduction of an unmarried female or for criminal conversation are not discharged.

Before the amendment of 1903 expressly included these "liabilities" for these classes of torts, it had been held, that judgments for seduction and criminal conversation were not released.¹⁵ But judgments for breach of promise to marry are discharged.¹⁶

However, where in an action for breach of promise to marry seduction is proved, it will be presumed that the substantial damages were awarded for the seduction, the real wrong suffered, and the debt will not be dischargeable in bankruptcy.¹⁷

§ 2761. Seventh Exception—Debts Not "Duly Scheduled."—Debts are not discharged that have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy,¹⁸ in time to have proved his claim.¹⁹

Miller v. Guasti, 226 U. S. 170, 29 A. B. R. 201, affirming 26 A. B. R. 797, 203 N. Y. 259: "Miller, in his bankruptcy schedules, set forth that the residence

15. *Tinker v. Colwell*, 11 A. B. R. 568, 193 U. S. 473 (affirming *Colwell v. Tinker*, 7 A. B. R. 333, 169 N. Y. 531, affirming 65 App. Div. 201, 6 A. B. R. 434, a case of a judgment for criminal conversation); In re *McCarty*, 7 A. B. R. 40, 111 Fed. 151 (D. C. Ills.), a case of a judgment for seduction of daughter by the bankrupt; In re *Freche*, 6 A. B. R. 479, 109 Fed. 620 (D. C. N. J.), also a case of a judgment for seduction of daughter. Contra, *Disler v. McCauley*, 7 A. B. R. 138, 66 N. Y. App. Div. 42; In re *Maples*, 5 A. B. R. 426, 105 Fed. 919 (D. C. Mont.).

16. *Disler v. McCauley*, 7 A. B. R. 138, 66 App. Div. N. Y. 42; In re *Fife*, 6 A. B. R. 258, 109 Fed. 880 (D. C. Pa.); *Finnegan v. Hall*, 6 A. B. R. 649 (N. Y. Sup. Ct.); obiter, In re *Brumbaugh*, 12 A. B. R. 207, 128 Fed. 971 (D. C. Penn.); impliedly (as being "provable"), In re *Crocker*, 8 A. B. R. 188 (Ref. N. Y.); impliedly (as being "provable"), In re *McCauley*, 4 A. B. R. 122, 101 Fed. 223 (D. C. N. Y.).

17. In re *Warth*, 29 A. B. R. 210, 200 Fed. 408 (C. C. A. N. Y., reversing S. C., 28 A. B. R. 41); *Bond v. Milliken*, 17 A. B. R. 811, 134 Ia. 447.

18. Bankr. Act, § 17 (a) (3); *Westheimer v. Howard*, 14 A. B. R. 547, 47 Misc. N. Y. 145; In re *Monroe*, 7 A. B. R. 706, 114 Fed. 398 (D. C. Wash.);

Dight v. Chapman, 12 A. B. R. 743, 44 Ore. 265; obiter, *Kaufman v. Schreier*, 17 A. B. R. 314, 108 App. Div. N. Y. 298; *Collins v. McWalters*, 6 A. B. R. 593, 35 Misc. N. Y. 648; instance, obiter, In re *McFaun*, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa); instance, *Cagliostro v. Indelle*, 17 A. B. R. 685, 58 Misc. N. Y. 44; analogously (composition) *B'dway Trust Co. v. Mainheim*, 14 A. B. R. 122, 47 Misc. N. Y. 415; obiter, In re *Muskoka Lumber Co.*, 11 A. B. R. 761, 127 Fed. 886 (D. C. N. Y.); instance held "duly scheduled," *Mueller v. Goerlitz*, 17 A. B. R. 687, 53 Misc. N. Y. 53; *Miller v. Guasti*, 226 U. S. 170, 29 A. B. R. 201, affirming *Guasti v. Miller*, 26 A. B. R. 797, 203 N. Y. 259; *Hazard Mfg. Co. v. Brown*, 25 A. B. R. 903 (Com. Pl. Pa.); *McKee v. Preble*, 31 A. B. R. 852, 136 N. Y. Supp. 915, 154 App. Div. 156.

And judgment obtained after discharge will not be reopened to let in defense of discharge where creditor is not "duly scheduled" and is without knowledge. *Reed v. Dippel*, 17 A. B. R. 371 (Pa.).

19. *Birkett v. Columbia Bank*, 12 A. B. R. 693, 190 U. S. 345.

Instance, amending schedules to include debt four days before the expiration of the year for proving claims, not in time, *McCreery & Co. v. Brown*, 29 A. B. R. 238 — Pa. Com. Pleas —

and occupation of Guasti and Bernard, holders of the judgment, were 'Unknown.—California.' * * * In view of the facts found, it is manifest that the debt of Guasti and Bernard was not scheduled as it should have been in order to make the discharge operative as to it. Their residence, though found to be known, was not stated, as required by the act, and the creditor did not have actual knowledge of the bankruptcy proceedings until long after their termination. We think the correctness of the judgment is so plain as not to require further argument."

Longfield v. Savings Bk., 14 A. B. R. 413, 103 N. W. 706, 95 Minn. 54: "A discharge in bankruptcy does not relieve the bankrupt from liability for a provable debt which was not scheduled with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

Tyrrel v. Hammerstein, 6 A. B. R. 431, 33 N. Y. Misc. 505: "Under the former Bankruptcy Act, which contained no such exception, the discharge was a bar, even though the creditor owing the demand was omitted from the schedule and received no notice of the proceeding, provided such omission was not willful or fraudulent (In *Matter of Archenbrow*, 11 Bank. Reg. 149; *Lamb v. Brown*, 12 id. 522; *Pattison v. Wilbur*, id. 193; *Williams v. Butcher*, id. 143; *Platt v. Parker*, 13 id. 14; *Thurmond v. Andrews*, id. 157; *Symonds v. Barnes*, 6 id. 377; *Batchelder v. Low*, 8 id. 571), and so under the State Insolvency Act. *Small v. Graves*, 7 Barb. 576; *Ayres v. Scribner*, 17 Wend. 407; *American Flask & Cap Co. v. Son*, 3 Abb. (N. S.) 337. The most pertinent inquiry, therefore, is, what was the defect in the former provision that Congress intended to remedy by the new one, for we must hold that the amendment was not made without a substantial purpose. The change most clearly indicated is that where the creditor has neither knowledge nor notice of the bankruptcy proceedings, his debt, if not duly scheduled, with his name if known to the bankrupt, is not to be discharged, whether the omission is fraudulent or otherwise. This would seem to be the application by Congress to bankruptcy proceedings of the familiar constitutional principle that the 'due process of law' intended to deprive one of property contemplates notice of some kind to the party whose property is to be taken that he may have his day in court and be heard before the court adjudicates against him."

Haack v. Theise, 16 A. B. R. 700, 51 Misc. (N. Y.) 3: "Every requirement of the Act and of the rule of the United States Supreme Court relating thereto, was ignored by the defendant in scheduling plaintiff's debt. The plaintiff as a creditor was incorrectly listed as 'Jaimes Haack and wife.' There was no such concern and the defendant had no such creditor. The resort to ditto marks in attempting to indicate the plaintiff's residence is in violation of both the letter and the spirit of the Act, as well as the rule, and, moreover, has never been sanctioned by authority. The rule is known as General Order Number V, and directs that all schedules shall be printed or written out plainly without abbreviations.

"But even if these ditto marks be invested with the broadest significance as a duplication of the statement of the residence of Shiby and Gaffney they are grossly insufficient. Then the residence of the plaintiff would be stated as 'c/o New York Clipper, N. Y. C.' By no analysis of that combination of words and letters could the conclusion be reached that a residence is indicated. The most liberal construction would locate the plaintiff's residence 'in care of New York Clipper, New York City.' With that information who could assert where the plaintiff resided?

"Save in the statement of the amount of the debt, the schedules further violate the provisions against the adoption of abbreviations."

Custard v. Wiggerson, 17 A. B. R. 337, 130 Wis. 412: "Under the bankruptcy law of 1867 this court held, in harmony with the general current of authority, that a debt was discharged, even though not scheduled. * * * But it will be seen that under the act of 1867 debts not scheduled were not excepted from the operation of discharge, while under the Bankruptcy Act of 1898 they are. * * * This provision is a marked departure from former bankruptcy acts, and decisions under such acts, to the effect that scheduling was not necessary in order to bring the debt within the order of discharge are not pertinent. The words of the present act, however, are plain and unambiguous, and there can be no doubt that they mean what they say; and, if so, unless the debt is duly scheduled in time for proof and allowance, or the creditor had notice or actual knowledge of the proceedings in bankruptcy, it is not affected by the discharge. * * * So far as the courts have spoken, etc."

§ 2762. "Due" Scheduling Dependent on Facts of Particular Case.—Under this exception, only duly scheduled debts are discharged, "due scheduling" probably meaning proper scheduling. Obviously, what is and what is not "due scheduling" must depend largely upon the facts of each case. In some instances "idem sonans" might be sufficient. To omit street and number in a large city, where the creditor's name is a common name, might be a failure to schedule "duly" although it might not be so in a small town. Likewise, mistakes in the initials of common names might be fatal, where similar mistakes in rare names might not be so. Debts must also have been scheduled in time for proof and allowance. It is not necessary that the name of the creditor be shown *if it is not known*, as is likely to be the case with negotiable paper in the hands of indorsees.

§ 2763. Thus, Initials Instead of Full Given Names.—Thus, it may be not "due" scheduling to give initials instead of the full given name. Indeed, in one case, it has been held *per se* to be not "due" scheduling;²⁰ but such holding would be extreme on discharge.

§ 2764. Abbreviations.—Thus, abbreviations may be not due "scheduling."²¹

One case, indeed, has held that even the abbreviation "Phila. Pa." is not "due" scheduling.²²

Also, see *obiter*, *Sutherland v. Lasher*, 11 A. B. R. 780, 41 N. Y. Misc. 240: "If it were necessary to pass upon the point it would also have to be held that

20. Compare, *obiter* (not on discharge), *In re Mackey*, 1 A. B. R. 595 (Ref. N. Y.). "Louis" Cohen instead of "Max" Cohen, not "due scheduling," *obiter*, *Cohen v. Pinkus*, 20 A. B. R. 787, 126 App. Div. 792, 111 N. Y. Supp. 82.

21. *Haack v. Theise*, 16 A. B. R. 700, 51 Misc. N. Y. 3.

Gen. Ord. V.: "All petitions and the

schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference."

22. Compare, *obiter* (not on discharge), *In re Mackey*, 1 A. B. R. 595 (Ref. N. Y.).

the words 'residence, 135 Bdwy.,' are not sufficient designation of any residence."

But such holding would be extreme on discharge and it would seem the use of the common abbreviations would be "due" scheduling.

§ 2765. **Ditto Marks.**—Thus, the use of ditto marks has been held improper scheduling.²³

§ 2766. **Partnership Debts in Individual Bankruptcy of Partner.**—Again, where in an individual bankruptcy, partnership debts of a firm, to which the bankrupt belonged, have not been properly described, such debts are not discharged.

In re McFaun, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa): "The schedules attached to the petition show that a large part of the indebtedness of the bankrupt consists of debts created by the firm of McFaun Bros. The petition for adjudication, the notice to creditors, and the petition for discharge make no reference to any firm liability, and do not ask any relief against firm debts. A discharge granted on this record will not, in my opinion, operate to bar the firm debts, but will only affect the debts owing by the bankrupt individually. * * * If bankrupt does not wish to amend, a discharge will be granted on the present record, but it will be at risk of bankrupt, so far as the firm debts are concerned."

And if the firm debts are not "duly" scheduled therein, the failure to effect their discharge would come rather from the statute itself than from any attempted limitation contained in the order of discharge.²⁴

And if they are scheduled properly therein, the partnership debt is discharged.

Lomis v. Wallblom, 13 A. B. R. 689, 94 Minn. 392: "Its full discharge as an individual liability on a firm debt may accordingly be had in bankruptcy proceedings.* * *

"The most serious question in this case is this: Was the indebtedness properly scheduled, so as to give notice to the plaintiff's assignor? This question must also be answered in the affirmative. In the schedule, the name of the original debtor, the nature and the amount of the original debt, are correctly stated. The evidence shows that respondent owed the creditor no other debt. Notice was properly given."

§ 2767. **Debts Intentionally Scheduled in Name of Original Payee When Held by Third Person.**—A debt intentionally scheduled incorrectly in the name of the payee when it is known that it is held by a discount bank, is not discharged.²⁵

²³. Haack v. Theise, 16 A. B. R. 700, 51 Misc. N. Y. 3; In re Mackey, 1 A. B. R. 594 (Ref. N. Y.): But this decision was not on the effect of discharge but rather as to the duty of the referee to require amendment of defective schedules. Ditto marks are liable to mislead and are per se not due scheduling.

²⁴. Inferentially and obiter, In re

McFaun, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa). But compare, In re Carmichael, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa).

²⁵. Columbia Bank v. Birkett, 7 A. B. R. 222 (Sup. Ct. N. Y.), 9 A. B. R. 481, 174 U. S. 112 (affirmed sub nom. Birkett v. Columbia Bank, 12 A. B. R. 691, 195 U. S. 345).

§ 2768. But Original Creditor Sufficient Where No Notice of Assignment.—But a scheduling of the debt in the name of the original creditor is sufficient, where no notice was received by the bankrupt of an assignment of the claim. Nor is the bankrupt bound to search the records to ascertain if any assignment has been made. The duty of giving notice rests on the assignee.²⁶

§ 2769. Stockholders' Liability, Either Corporate Creditors or Receiver May Be Scheduled.—In order to a "due scheduling" of stockholders' liabilities, either the creditors of the corporation may be scheduled.

Longfield v. Sav. Bk., 14 A. B. R. 413, 103 N. W. (Minn.) 706: "The creditors of an insolvent corporation brought an action against it and its stockholders to determine and enforce their liability to them. Judgment was entered therein determining who the creditors were and the respective liability of the stockholders to them, and designating a receiver to collect and enforce on their behalf such liability, and for that purpose it was adjudged that he recover in the action from each stockholder the amount of his adjudged liability and have execution therefor. Thereafter one of the stockholders was discharged from his debts in bankruptcy, but in his schedule of creditors he named the creditors for whose benefit the judgment was rendered, and not the receiver.

"Held, that his actual creditors were named in the schedule, and that his discharge released him from liability on the judgment."

Or the receiver appointed in the stockholders' liability suit may be scheduled.²⁷

§ 2770. Failure to Give Street Number in City Where Ascertainable.—Failure to give the number of the street of the creditor's address in a great city, where ascertainable by due diligence, is not "due scheduling."²⁸

§ 2771. Giving Name and Street Correctly, but City Wrong, Not "Due" Scheduling.—The giving of the name and street correctly, but not the right city is, of course, not "due" scheduling.

Westheimer v. Howard, 14 A. B. R. 547, 47 N. Y. Misc. 145: "If by the default of the bankrupt no notice reaches the creditor and no actual knowledge on his part is shown, the debt is not discharged. The schedule of debts which the bankrupt files furnishes the basis for the notices sent by the referee or the court and 'thus, the bankrupt appears to be made responsible for the correctness of the list of his creditors.'

"In the case at bar the schedule gives the address 317 Main street New York

²⁶. *Mueller v. Goerlitz*, 17 A. B. R. 687, 53 N. Y. Misc. 53; *Lent v. Farnsworth*, 180 N. Y. 503.

²⁷. *Birkett v. Columbia Bk.*, 12 A. B. R. 691, 195 U. S. 345, affirming *Columbia v. Birkett*, 9 A. B. R. 481. Compare, that actual notice to receiver is

sufficient to bind corporate creditors, *Dight v. Chapman*, 12 A. B. R. 745, 44 Ore. 265.

²⁸. *Cagliostro v. Indelle*, 17 A. B. R. 685, 58 N. Y. Misc. 44; *Kreitlein v. Ferger*, 28 A. B. R. 908, 52 Ind. Ct. App. 199.

city. There is no presumption that notices so addressed reached them at 317 Main street, Cincinnati, O. The questions excluded by the justice were competent to show, first, that no notices reached the plaintiffs, and secondly, that they had no actual knowledge of the proceedings. The judgment should be reversed."

§ 2772. "**Idem Sonans.**"—A misnomer is not always fatal, but may be so.²⁹

§ 2772½. **Office Address Instead of Residence.**—Where it is proved that no notice was actually received, the giving of an office address instead of the residence has been held not "due scheduling."³⁰

§ 2773. **Innocent Intent in Faulty Scheduling, No Excuse.**—It is immaterial whether the omission, or the failure to schedule "duly" the debt, was innocent, or was fraudulent, willful, intentional or careless; the fact, not the intent, controls under the present law.³¹

§ 2774. **Where Actual Address Unknown, a Guess at Surmised Address Not Sufficient.**—A debt is not "duly" scheduled where, although the actual address is unknown, the bankrupt nevertheless makes a guess and mentions a surmised address as the real address; for the forms require that if the creditor's address is unknown, the fact is to be stated.³² And an address "In care of New York Clipper" is not an address within the meaning of the law.

§ 2775. **Reasonable Diligence in Ascertaining Correct Address Requisite.**—The bankrupt is bound to use reasonable diligence in ascertaining a creditor's correct address; and failure to use due diligence in that regard will bar the excuse of lack of actual knowledge.³³

Thus, failure to look in the city directory of a great city, both creditor and bankrupt being residents, is not due scheduling.³⁴

§ 2776. **Where All Addresses Stated to Be Unknown, Court to Withhold Discharge until Satisfied Due Diligence Exercised.**—Where all the addresses are stated to be "unknown," mere notice by publication will be insufficient, unless the court is satisfied that reasonable dil-

29. Instance where fatal, *Custard v. Wiggerson*, 17 A. B. R. 337 (Wis. Sup. Ct.): "Castard" for "Custard."

30. *Weidenfeld v. Tillinghast*, 18 A. B. R. 534 (City Court of New York); *McKee v. Preble*, 31 A. B. R. 852, 138 N. Y. Supp. 9, 154 App. Div. 156.

31. *Tyrrel v. Hammerstein*, 6 A. B. R. 431, 33 N. Y. Misc. 505. Contra, under the old law of 1867, *Tyrrel v. Hammerstein*, *supra*, and cases cited.

32. *Sutherland v. Lasher*, 11 A. B. R. 780 (Sup. Ct. N. Y. Special Term 1903);

inferentially, *Westheimer v. Howard*, 14 A. B. R. 547, 47 Misc. N. Y. 145.

33. *Schiller v. Weinstein*, 15 A. B. R. 183, 47 N. Y. Misc. 622; *Cagliostro v. Indelle*, 17 A. B. R. 685, 52 N. Y. Misc. 44; *In re Dvorak*, 6 A. B. R. 66, 107 Fed. 76 (D. C. Iowa); *Feldmark v. Weinstein*, 45 Misc. 329; *obiter*, *Weidenfeld v. Tillinghast*, 18 A. B. R. 533 (N. Y. City Ct.).

34. *In re Quackenbush*, 19 A. B. R. 647, 122 App. Div. 456, 106 N. Y. Supp. 773; *Murphy v. Blumenreich*, 19 A. B. R. 910, 123 App. Div. (N. Y.) 645.

igence has been exercised in trying to ascertain the addresses; and the discharge may meanwhile be withheld.³⁵

§ 2777. Actual Knowledge by Creditor Cures Defective Scheduling.—If the creditor has actual knowledge of the bankruptcy proceedings in time to prove his claim, his omission from the schedules or the defective scheduling of him, is cured.³⁶

Zimmerman v. Ketchum, 11 A. B. R. 190, 71 Pac. 264, 76 Kan. 98: "A discharge in bankruptcy will prevent a recovery against the bankrupt upon an account for lumber and material sold to and used by him in the erection of a dwelling house upon his homestead, although such liability is not scheduled in the bankruptcy proceedings, if the creditor had notice or actual knowledge of the proceedings in bankruptcy."

§ 2778. No Particular Form of Notice Requisite.—No particular form of notice, nor of service of notice, is requisite in order to give such actual knowledge. Actual notice is sufficient, however acquired; and it may be proved by circumstantial evidence.³⁷

Thus, of course, direct statement by the bankrupt or his attorney to the creditor is sufficient.³⁸

Again, if the creditor had no written notice of the bankruptcy proceedings, yet if he received notice derived from reading the newspapers or from a verbal communication from the defendant which gave him actual knowledge of the proceedings in bankruptcy within a short time after the filing of the petition, with an opportunity to file and prove his own claim, to participate in the meetings of the creditors, to join in the examination of the bankrupt, and to participate in the first and subsequent dividends declared and paid, the debt is discharged by the discharge in bankruptcy.³⁹

§ 2779. Agent's Knowledge Imputable to Principal.—Knowledge of the agent may be imputed to the principal.⁴⁰

35. *In re Dvorak*, 6 A. B. R. 66, 107 Fed. 76 (D. C. Iowa); *In re Mackey*, 1 A. B. R. 593 (Ref. N. Y.).

36. Bankr. Act, § 17 (a) (3); *Broadway Trust Co. v. Manheim*, 14 A. B. R. 122, 47 N. Y. Misc. 415; *inferentially*, *Birkett v. Columbia*, 12 A. B. R. 693, 195 U. S. 345; *Dight v. Chapman*, 12 A. B. R. 745, 44 Ore. 265; *Kaufman v. Schreier*, 17 A. B. R. 314, 108 App. Div. N. Y. 298; *Knapp v. Harold*, 25 Ohio C. C. 213; *obiter*, *Haack v. Theise*, 16 A. B. R. 700, 51 Misc. (N. Y.); *inferentially*, *Sutherland v. Lasher*, 11 A. B. R. 780 (Sup. Ct. N. Y. Special Term); *Morrison v. Vaughan*, 18 A. B. R. 704, 119 App. Div. 184, 104 N. Y. Supp. 169, quoted at § 2780; *Cohen v. Pinkus*, 20 A. B. R. 787, 126 App. Div. 792, 111 N.

Y. Supp. 82; *obiter*, *Weidenfeld v. Tillinghast*, 18 A. B. R. 531 (City Court of N. Y.); *Finnell v. Armoura*, 26 A. B. R. 802, 39 Utah 316.

37. *Knapp v. Harold*, 25 Ohio C. C. 213.

38. *Cohen v. Pinkus*, 20 A. B. R. 787, 126 App. Div. 792, 111 N. Y. Supp. 82.

39. *Morrison v. Vaughan*, 18 A. B. R. 704, 119 App. Div. 184, quoted at § 2780.

40. *Dight v. Chapman*, 12 A. B. R. 745, 44 Ore. 265: This was a case of the actual knowledge of the receiver in a stockholders' liability suit imputed to all creditors. *New England, etc., Co. v. Leibson*, 29 A. B. R. 62, — Pa. Com. Pleas —.

§ 2780. Knowledge Not Sufficient unless in Time for Creditor to Avail Himself of Benefits of Law.—Such actual knowledge must have been acquired in time to have enabled the creditor to avail himself of the benefits of the law, else it will not suffice to obviate the lack of due scheduling.⁴¹

Birkett v. Columbia Bank, 195 U. S. 345, 12 A. B. R. 693: "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends (§ 65). The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor."

It has been held, however, that even if the notice were not in time to enable the creditor to participate in the election of a trustee, it is sufficient if it be in time for him to file his claim, participate in other meetings of creditors, to examine the bankrupt and to get his share of dividends.

Morrison v. Vaughan, 18 A. B. R. 704, 119 App. Div. 184, 104 N. Y. Supp. 169: "While the plaintiff had no written notice of the bankruptcy proceedings he had notice derived from reading the newspapers and from the verbal communication of the defendant and his clerk, which gave him actual knowledge of the proceedings in bankruptcy, within a short time after the filing of the petition, with opportunity to have filed and proved his own claim, to have participated in the meetings of the creditors, to have joined in the examination of the bankrupt and his father, and also to have participated in the first and subsequent dividends declared and paid; in short, to have participated in all the proceedings taken, with the exception of the choice of the trustee. In consideration of the relative value of plaintiff's claim as against the \$224,000 of scheduled claims, the representatives of which exercised that choice, this cannot be considered to have been a very material deprivation of any of his rights. That is, he received notice and actual knowledge in time to have participated in all the material proceedings and to have secured his proportional share of the bankrupt's assets. Laughlin, J., dissenting: There was no evidence tending to show that the respondent, an unscheduled creditor of the bankrupt, had notice of the bankruptcy proceedings on or before November 24, 1899, on which day the creditors met and appointed a trustee. Participation in the appointment of a trustee is one of the rights conferred upon creditors. (Bankruptcy Act of 1898 * * * § 44.) I am of the opinion that it should not be held that an unscheduled creditor has had 'notice or actual knowledge of the proceedings in bankruptcy' (Bankruptcy Act of 1898 * * * § 17, subd. 3), unless he has had notice or actual knowledge in time to exercise all of the rights of a creditor, as if he had been duly scheduled, for in no other way is he given an equal opportunity with other creditors to participate in the administration of the estate and to protect his rights."

§ 2781. Defending, That Debt Not "Duly" Scheduled, Not Collateral Attack.—Avoiding the effect of a discharge by alleging one's

41. Compare ante, § 494.

claim was not "duly scheduled" is not a collateral attack on the discharge.⁴²

It is not a direct attack either: it is not an attack upon the discharge at all, but rather a carrying out of its terms, for, by the law itself, the discharge is not to operate upon claims not duly scheduled.⁴³

Schiller v. Weinstein, 15 A. B. R. 184, 47 N. Y. Misc. 622: "By this determination 'The validity and effectiveness of the discharge in general are not questioned' and 'it does not extend to this particular claim.'"

§ 2782. After Discharge Too Late to Amend Schedules to Include Omitted Creditors.—After discharge has been granted, it is too late to amend the schedules to include the omitted creditor.⁴⁴

§ 2783. Eighth Exception—Claims for Fraud, Embezzlement, etc., While Officer or in Fiduciary Capacity.—Debts, demands and claims created by the bankrupt's fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity, are not discharged.⁴⁵

§ 2784. Must Be Committed While Acting as "Officer" or in "Fiduciary Capacity."—The fraud, embezzlement, misappropriation as well

⁴². See ante, § 2667.

Sutherland v. Lasher, 11 A. B. R. 780, 41 N. Y. Misc. 251 (quoted ante, § 2667; affirmed 87 App. Div. 633).

⁴³. See ante, § 2667.

⁴⁴. In re Spicer, 16 A. B. R. 802, 145 Fed. 431 (D. C. N. Y.); compare, In re McKee, 21 A. B. R. 306, 165 Fed. 269 (D. C. N. Y.).

⁴⁵. Bankr. Act, § 17 (a) (4); *Crawford v. Burke*, 12 A. B. R. 668, 195 U. S. 176; In re Bullis, 7 A. B. R. 238 (Sup. Ct. N. Y. App. Div.); *Morse v. Rogers & Kaufman*, 7 A. B. R. 549 (Sup. Ct. App. Va.); In re Blumberg, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.); *Western Union Cold Storage Co. v. Hurd*, 8 A. B. R. 634, 116 Fed. 442 (D. C. Mo.); *Bryant v. Kinyon*, 6 A. B. R. 237 (Mich.); In re Floyd, *Crawford & Co.*, 15 A. B. R. 277 (Special Master N. Y.); In re Basch, 3 A. B. R. 235, 97 Fed. 761 (D. C. N. Y.); In re Butts, 10 A. B. R. 16, 120 Fed. 960 (D. C. N. Y.); In re Gaylord, 7 A. B. R. 577, 113 Fed. 131 (D. C. Mo.); *Watertown Carriage Co. v. Hall*, 11 A. B. R. 18 (N. Y. Ct. App., affirming 10 A. B. R. 23 and 7 A. B. R. 716); *Knott v. Putnam*, 6 A. B. R. 80, 107 Fed. 907 (D. C. Vt.); *Burnham v. Pidcock*, 5 A. B. R. 590, 68 N. Y. Supp. 1007 (affirming 5 A. B. R. 42).

Tindle v. Birkett, 18 A. B. R. 121, 205 U. S. 185 (affirming *Tindle v. Birkett*, 15 A. B. R. 179, 171 N. Y. 520); *Clafin Dry Goods Co. v. Eason*, 2 A. B. R. 263 (D. C. Va.); In re Harper, 13 A. B. R. 430, 133 Fed. 970 (D. C. Va., affirmed sub nom. *Harper v. Rankin*, 15 A. B. R. 608, C. C. A. W. Va., affirming In re Harper), wherein a bank officer was held to be such officer; *Reeves v. McCracken*, 13 A. B. R. 680, 69 N. J. Ch. 203; *Bills v. Schliep*, 11 A. B. R. 611 (C. C. A. N. Y.); conversion by factor; *Morse & Rogers v. Kaufman*, 7 A. B. R. 549; 100 Va. 218; *Harper v. Rankin*, 15 A. B. R. 608 (C. C. A. W. Va., affirming In re Harper, 13 A. B. R. 430, 133 Fed. 970, D. C. Va.); obiter, In re Adler, 16 A. B. R. 416, 144 Fed. 659 (C. C. A. N. Y.); *Williams v. Chemical Co.*, 31 A. B. R. 64, — Ala. —; In re Gulick, 26 A. B. R. 362, 186 Fed. 350 (D. C. N. Y.).

Bracken v. Milner, 5 A. B. R. 23 (D. C. Mo.): Trust deed, bankrupt acting as trustee, foreclosing deed but converting proceeds: Secretly buying in property at foreclosure of beneficiary's trust deed; held fiduciary capacity.

Proving claim does not change relationship of parties. *Brown v. Hannagan*, 27 A. B. R. 294, 210 Mass. 246. Compare ante, § 2750½.

as the defalcation must have been committed while acting as an officer or in a fiduciary capacity.⁴⁶

§ 2785. "Fiduciary Capacity" Refers to Express Trusts and Excludes Conversions by Agents, etc., Also Fraudulent Transfers.—"Fiduciary capacity" refers to technical or express trusts and excludes conversions and frauds by commission men, brokers, agents, partners, etc., and other implied trustees.⁴⁷

46. *Crawford v. Burke*, 12 A. B. R. 668, 195 U. S. 176; *In re Bullis*, 7 A. B. R. 238, 63 App. Div. N. Y. 508; *Morse & Rogers v. Kaufman*, 7 A. B. R. 549, 100 Va. 218; *In re Harper*, 13 A. B. R. 430, 133 Fed. 970 (D. C. Va.); *In re Adler*, 16 A. B. R. 416, 144 Fed. 659 (C. C. A. N. Y.); *In re Wenman*, 6 A. B. R. 691 (D. C. N. Y.): Ticket agent converting proceeds of sales of tickets.

Contra, *In re Butts*, 10 A. B. R. 16, 120 Fed. 960 (D. C. N. Y.); *contra*, *Frey v. Torrey*, 8 A. B. R. 196 (N. Y. Sup. Ct. App.); That this case is overruled by *Crawford v. Burke*, *supra*, see *Tindle v. Birkett*, 15 A. B. R. 180, 171 N. Y. 520.

Whether "Officer" and "Fiduciary Capacity" Modified Only "Defalcation," before Amendment 1903.—It was held, even before the amendment of 1903 (and by a judge who was on the judiciary committee of congress that framed the law) that the clause "while acting as an officer or in any fiduciary capacity" modified only "defalcation," and that for this reason debts not reduced to judgment, created by the bankrupt's fraud, embezzlement or misappropriation were not discharged, although the bankrupt were not "acting as an officer nor in any fiduciary capacity." And there was some weight to this argument, for otherwise there would have been a redundancy of words in the statute and each word used would not have been given a distinct meaning as is required by the canons of statutory construction, if it is possible to do so at all.

Obiter, *In re Butts*, 10 A. B. R. 16, 120 Fed. 960 (D. C. N. Y.); *In re Nuttall*, 29 A. B. R. 800, 201 Fed. 557 (D. C. N. Y.); *Frey v. Torrey*, 8 A. B. R. 196, 70 App. Div. N. Y. 166 (affirming *Frey v. Torrey*, 6 A. B. R. 448). That this case is overruled by *Crawford v. Burke*, 12 A. B. R. 668, 175 U. S. 176, see *Tindle v. Birkett*, 15 A. B. R. 180, 171 N. Y. 520.

But the necessity for such distinction no longer exists since, by the amendment of 1903, the requirement that the liability must have been reduced to a judgment has been removed, although even yet not all frauds are excepted, but only that of obtaining property by false pretenses or false representations. See discussion of second exception, *ante*, § 2746.

47. *Gee v. Gee*, 7 A. B. R. 503 (Minn.), misappropriation of funds by partner. *Tindle v. Birkett*, 18 A. B. R. 121, 205 U. S. 185 (affirming S. C. 15 A. B. R. 179, 171 N. Y. 520). A claim for goods obtained by false representations before amendment of 1903. *In re Wenman*, 16 A. B. R. 691 (D. C. N. Y.), a conviction by ticket agent of proceeds of sales of tickets. *Burnham v. Pidcock*, 5 A. B. R. 590, 68 N. Y. Supp. 1007; *Western Union Cold Storage Co. v. Hurd*, 8 A. B. R. 634, 116 Fed. 442 (D. C. Mo.); *In re Adler*, 16 A. B. R. 417, 114 Fed. 659 (C. C. A. N. Y.); *In re Gaylord*, 7 A. B. R. 577, 138 Fed. 131 (D. C. Mo.); *In re Butts*, 10 A. B. R. 16, 120 Fed. 960 (D. C. N. Y.); *instance*, *Fechter v. Postal*, 17 A. B. R. 316 (Sup. Ct. N. Y. App. Div.); *In re Basch*, 3 A. B. R. 235, 97 Fed. 761 (D. C. N. Y.).

In re Hale, 20 A. B. R. 633, 161 Fed. 387 (D. C. Conn.); *obiter*, *Flanders v. Mullin*, 18 A. B. R. 708, 80 Vt. 124; *obiter*, *Mathieu v. Goldberg*, 19 A. B. R. 191, 156 Fed. 541 (D. C. N. Y.); *Maxwell v. Martin*, 22 A. B. R. 93, 130 App. Div. N. Y. 80; *In re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.).

Karger v. Orth, 27 A. B. R. 212, 116 Minn. 124; *Hanan v. Long*, 32 A. B. R. 132, 134 N. Y. Supp. 786, 150 App. Div. 327; *Inge v. Stillwell*, 28 A. B. R. 892, 88 Kans. 33; *In re Camelo*, 28 A. B. R. 353, 195 Fed. 632 (D. C. N. Y.); *Amer. Chemical Co. v. Berry*, 31 A. B. R. 142, 110 Me. 528. Apparently *contra* *Williams v. Chemical Co.*, 31 A. B. R. 64, — Ala. —.

Compare, to same effect, under the

Bills v. Schliep, 11 A. R. R. 611, 127 Fed. 103 (C. C. A. N. Y.): "The debt of a factor for moneys received on sale of a principal's goods has been held not to be a debt created by one acting in a fiduciary capacity, within the meaning of the Bankrupt Law. * * * But the obligation of a factor for goods intrusted to him is of a fiduciary character, and, before sale, the principal may restrain an unauthorized disposition of such property, or compel observance of the conditions of such trust; and, after, the principal may equitably follow the moneys received from the sale of such goods into the hands of any person who receives them with knowledge of their trust character."

Knott v. Putnam, 6 A. B. R. 80, 107 Fed. 907 (D. C. Vt.): And this is so although the judgment obtained in the state court for the conversion recites that "the sum on which this judgment was rendered was received and held by the defendants in a fiduciary capacity for the plaintiff" and that "the cause of action arose from the willful and malicious act of the defendants, and they ought to be confined in close jail." Where the matter is before the bankruptcy court, the state court's judgment will only be binding as to parties, amounts and times and not as to the character of the debt.

In re *Benedict*, 8 A. B. R. 463, 75 N. Y. Supp. 165: "In the present case the bankrupt did not come into possession of the goods of the plaintiff by fraud or false representations. They were consigned to him and his possession was a lawful one. By his contract with the plaintiff it became his duty to account for the proceeds of sales made by him. He failed to do this, and converted the money to his own use. It would seem, under the authority of the above cases, that the judgment was one which was dischargeable by bankruptcy proceedings."

Mulock v. Byrnes, 129 N. Y. 23: "It has been frequently held in cases of controlling authority that the language of the Bankrupt Law does not apply to cases of implied trusts; but only to those technical trusts which are actually and expressly constituted by the parties. * * * That the evidence and the affidavits in the case under consideration 'show no other or different trust or fiduciary relation than such as may be said always to exist in a case of agency. In every such case there is an element of trust and confidence, so that a breach of duty may be said to be a breach of trust, but the agent is, nevertheless, not a fiduciary within the meaning of the Bankrupt Act.'"

In re *Floyd, Crawford & Co.*, 15 A. B. R. 277 (Ref. N. Y.): "* * * and there is nothing better settled in the Bankruptcy Law than that the liability of a converting bankrupt is not within the terms of § 17 (a) (2)."

law of 1867, *Upshur v. Briscoe*, 138 U. S. 378; [1867] *Hennequin v. Clews*, 111 U. S. 676; [1867] In re *Brown*, Fed. Cases 979; *Cronon v. Cutting*, 104 Mass. 245; [1867] *Palmer v. Hussey*, 118 U. S. 96; [1867] *Ames v. Moir*, 138 U. S. 306; [1867] In re *Smith*, 22 Fed. Cas. 388; [1867] *Keine v. Graff*, 17 N. B. Reg. 319, 14 Fed. Cas. 218; [1867] *Omsley v. Cobin*, 5 N. B. Reg. 489, 8 Fed. Cas. 929; [1867] *Zeperink v. Card*, 11 Fed. 295. .

But contra, that they include implied trusts such as those of officers of corporations, see In re *Harper*, 13 A.

B. R. 430, 133 Fed. 970 (D. C. Va.).

And also contra, that other conversions than those by express trustees are discharged, *Watertown v. Hall*, 11 A. B. R. 15, 66 N. Y. App. Div. 84, affirming 10 A. B. R. 23 and 7 A. B. R. 716).

Whether the relation between the stockbroker and his customer in the purchase of stock is that of debtor and creditor, or of agent and principal, or of pledgor and pledgee, etc., see ante, § 1313; also, see *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496 (affirming 117 La. 821).

Barrett v. Prince, 143 Fed. 302, 16 A. B. R. 65 (C. C. A. Ills.): “* * * mere confidence reposed in the punctuality or integrity of a person with whom one has commercial transactions is not the fiduciar~~y~~ relation that was meant to be covered by the excepting portion of the Bankrupt Act.”

[1841] *Chapman v. Forsyth*, 2 How. (U. S.) 202: “If the Act embraces such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act.”

It also excludes the implied trust of a fraudulent transferee existing in favor of creditors.^{47a}

Reeves v. McCracken, 13 A. B. R. 680, 69 N. J. Eq. 203: “Held (1) that, the words ‘Fiduciary capacity’ having reference only to technical trusts, a debt arising out of an implied understanding had on a conveyance in the ordinary form of an absolute deed from R. to M. of certain parts of R.’s real estate, no trust being expressly declared, was not excepted from the operation of a discharge; (2) that the fair inference from the facts stated was that the conveyance was intended to hinder and delay creditors, and that the grantee therein did not for that reason also hold in a fiduciary capacity within the meaning of the Act.”

And it has been held that although the relation of broker and customer, like any other relation of principal and agent or pledger and pledgee, is of a fiduciary character, it does not come within the meaning of the word “fiduciary” as used in § 17 of the bankruptcy act.⁴⁸

It has been held, indeed, that wilful and wanton conversion of a customer’s stock by a bankrupt stockholder comes within the other exception of “wilful and malicious injuries to the property of another,”⁴⁹ and this holding, though criticised in one case as a strained construction,⁵⁰ has been affirmed by the appellate court and followed by other courts.⁵¹

Similarly, it has been held that a naked bailee of money, under an express agreement to keep safely and pay over on request, is not acting in a fiduciary capacity” within the meaning of the act.⁵²

But there may exist such fiduciary relation even in cases of conversions by commission men, agents, brokers, partners, etc., the line of distinction being

47a. See post, § 2789; also, *In re Blumberg*, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.), quoted at § 2789.

48. *Clark v. Millikin*, 25 A. B. R. 680, 70 N. Y. Misc. 492. Compare ante, § 2754¼, “Willful Conversion as Constituting ‘Liability for Willful and Malicious Injury to Property.’”

49. *Kavanaugh v. McIntyre*, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987.

50. *In re Ennis & Stoppani*, 22 A. B. R. 679, 177 Fed. 765 (D. C. N. Y.).

51. *Kavanaugh v. McIntyre*, 31 A. B. R. 712, 210 N. Y. 175 quoted at § 2754¼; *In re Arnao*, 32 A. B. R. 88, 210 Fed. 395 (D. C. N. Y.) quoted at § 2754¼; also see § 2754¼.

52. *Lewis v. Shaw*, 19 A. B. R. 866, 122 App. Div. 99, 106 N. Y. Supp. 1012.

well expressed in *Haggerty v. Bodkin*, 18 A. B. R. 302, 72 N. J. Ch. 473:

"I have already referred to the reasoning by which the courts have held that the ordinary relation between factor and principal was not fiduciary within the meaning of that word here involved. It is that those transactions are mercantile transactions in which the principal must have known that his factor would, in the ordinary course of business, mingle the money received from the sale of his goods with his own, and that the ordinary relation of debtor and creditor arose out of those transactions, and that it was not the duty of the factor to earmark or segregate the proceeds of the sale of his principal's goods and remit at once. In fact, the ordinary course of business in such cases renders such restrictive dealing impracticable. The principal often obtains from the factor money in advance upon his goods, and the goods are not sold ordinarily in a lump, nor is the payment received in a single lump. The principal relies upon the personal responsibility of his factor. The courts held that it was and is contrary to public policy, as manifested in the bankrupt law, to except such a large class of unfortunate creditors from its benefits. This consideration covers the case in 2 How. (U. S.), 202, 11 L. Ed. 236, cited hereinbefore, and all cases of that character."

And in that case the court held in substance that a discharge in bankruptcy was no defense to an action brought by an administrator to recover money which had been deposited by the intestate with the defendant for his share of the capital of a proposed partnership, the intestate being taken sick within a few days after making such deposit, and which money the defendant had placed in a bank and converted to his own use after the death of the intestate; on the ground that the death of the intestate dissolved the partnership and the defendant held the money in a fiduciary capacity within the meaning of § 17 (4).

And the conduct of a factor may be such as to amount to actual fraud, if not embezzlement.^{52a}

§ 2786. "Fiduciary" Relation Must Exist Independently of Transaction in Which Debt Arose.—"Fiduciary capacity" implies one existing previously to or independently of the particular transaction out of which the debt arises.⁵³

Inferentially, obiter, In re Harper, 13 A. B. R. 430, 133 Fed. 970 (D. C. Va., affirmed sub nom. *Harper v. Rankin*, 15 A. B. R. 608, 141 Fed. 625): "But it seems clear that implied trusts—a term usually employed in distinguishment from express trusts—where the trust obligation is to be implied from the contract, are in many cases not to be held as embraced within the term 'fiduciary capacity' as used in the Acts of 1841 and 1867."

§ 2787. Whether Includes "Officers" of Private Corporation.—It is a question whether "officer" as here used includes officers of private cor-

^{52a}. *Methieu v. Goldberg*, 19 A. B. R. 191, 156 Fed. 541 (D. C. N. Y.).

⁵³. *Bryant v. Kinyon*, 6 A. B. R. 237, 127 Mich. 152; *American Chemi-*

cal Co., 31 A. B. R. 142, 110 Me. 528. Contra, *Williams v. Chemical Co.*, 31 A. B. R. 64 (Ala.). Also see cases cited in preceding section.

porations, as held in some cases,⁵⁴ or is confined to public officers, as held in others.⁵⁵

That it is not so confined, see

In *re Harper*, 13 A. B. R. 430, 133 Fed. 970 (D. C. Va. affirmed sub nom. *Harper v. Rankin*, 15 A. B. R. 608, 141 Fed. 625, C. C. A.): "And a reason of some force exists for the supposition that Congress intended by the change of language to extend the exception in clause 4 of § 17, so as to include debts created by the fraud, or embezzlement, or misappropriation or defalcation of officers of private corporations. The Supreme Court, in *Chapman v. Forsythe*, 2 How. 202, 207, limited the meaning of the expression in the Act of 1841, 'any other fiduciary capacity,' so that it did not include a fiduciary (other than an executor, administrator, guardian, or 'special' trustee) whose trust is one implied from his contract. * * * The trust or obligation of officers of private corporations, who are given such control of the funds or credits of the corporation as to be able to commit embezzlement, misappropriation, or defalcation, is rarely or never created by the express terms of any writing. On the other hand, such trusts correspond to and satisfy the commonly accepted definition of implied trusts:

"Those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties.' 2 Bouv. Dict. 754.

"In drafting the Act of 1898, Congress must be presumed to have known the limited meaning given by the courts to the expression 'fiduciary capacity,' and the employment of this often adjudicated expression indicates that it is used with the limited meaning given it under the former laws. The consequence, therefore, of again using the term 'public officer' might have been to reduce the embezzlements and defalcations not excepted from discharge in bankruptcy to a minimum. The vast numbers of private corporations, the immense sums necessarily put under the control of the officers of such corporations, and the evil results of allowing dishonest officials of private corporations who have committed embezzlement, misappropriation, or defalcation to have discharges in bankruptcy from debts thus created, afford a sufficient reason for an intent on the part of Congress to forbid discharges of debt so created by such person. * * * I am forced to the conclusion that the word 'officer' includes an officer of a private corporation."

In *re Gulick*, 26 A. B. R. 362, 186 Fed. 350 (D. C. N. Y.): "Still the question remains whether a corporation officer is an 'officer' within the clause. I can see no answer to Judge McDowell's reasoning when *Harper v. Rankin* came before him in first instance. In *re Harper* (D. C. Va.), 13 Am. B. R. 430, 133 Fed. 970. The words had been 'public officer' in the act of 1841 and the act 1867, and the change has presumably some significance. As the restrictive adjective was stricken out, the intent must have been, if there was a change at all, to include such officers as were not public. Such officers can only be officers of private corporations or associations, and I think that this is what was meant. Certainly it is undesirable to look too scrupulously for exceptions in the natural meaning of the clause. There is no reason to strain the words, so as to protect those who avowedly are guilty of fraud, embez-

⁵⁴. *Harper v. Rankin*, 15 A. B. R. 608, 141 Fed. 625 (C. C. A. Va., affirming *In re Harper*, 13 A. B. R. 430, 133 Fed. 970, D. C. Va.); *In re Gu-*

lick, 26 A. B. R. 362, 186 Fed. 350 (D. C. N. Y.).

⁵⁵. *Obiter*, *In re Floyd*, *Crawford & Co.*, 15 A. B. R. 281 (Ref. N. Y.).

zlement, misappropriation, or defalcation. The 'peculiar modes and habits of business' prevailing amongst our people (*Hennequin v. Clews*, 111 U. S. 676, 683, 4 Sup. Ct. 576, 580, 28 L. Ed. 565) do not, I trust, involve any inevitable predilection for the preservation of debts arising from the abuse of trust and confidence, and, where there is a fair possibility for difference of opinion, a court ought surely to construe the statute *contra spoliatores*. Although the question cannot be said to be free from doubt, the chances all seem to be that by the change Congress intended to widen the scope of section 17 (4).

§ 2788. "Fraud" Means Moral Turpitude or Intentional Wrong.—"Fraud," as here used, means moral turpitude or intentional wrong.⁵⁶

In *re Blumberg*, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.): "It is not to be doubted that the purpose of this statute is the same as a similar provision found in the former Bankruptcy Law; and that the word fraud means moral turpitude or intentional wrong; and that a part of the purpose of the statute was to discourage and punish such moral turpitude or intentional wrong."

§ 2789. "Fraud" Must Have Existed in Original Transaction.—And the fraud must have existed in the original transaction and fraudulent conveyances to defeat the obligation or false denials of mistake, etc., etc., are not sufficient.⁵⁸

In *re Blumberg*, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.): "It could not possibly, I think, have any application to a case where the judgment is not based upon the fraud as a ground of recovery. * * * Their suit was one based upon a just debt, having its origin back of any mere suggestion of fraud, in which there was sought the incidental relief of setting aside a fraudulent conveyance. Such a fraudulent conveyance itself, under the law of the State, gave nobody a right to a money judgment in the first instance. It simply rendered the sale void, and enabled any creditor against whom it was declared void to have it set aside, just as if it never had been made, and to reach the property and subject it to a debt not created at all by the fraudulent conveyance; but created prior thereto, and to obstruct collection of which the fraudulent conveyance was made. If the fraudulent vendee had disposed of the property, so that a judgment might be rendered against him for the value of the property, such a judgment would be for the property; on the ground that the fraudulent sale being void, it belonged to his fraudulent vendor, and that his disposition of it was a conversion."

Western Union Cold Storage Co. v. Hurd, 8 A. B. R. 634, 116 Fed. 442 (D. C. Mo.): "The fact that the defendant, when restitution was demanded, denied liability, against the great weight of evidence, could not convert the wrongful detention of the money into an original positive fraud, essential in the creation of a debt to avoid the effect of a discharge in bankruptcy."

⁵⁶ *Western Union Cold Storage Co. v. Hurd*, 8 A. B. R. 634, 116 Fed. 442 (D. C. Mo.); In *re Floyd, Crawford & Co.*, 15 A. B. R. 277 (Special Master N. Y.); compare [1867] *Neal v. Clark*, 95 U. S. 704; *Haggerty v. Badkin*, 18 A. B. R. 302 (N. J. Ch.); *Louisville & N. R. Co. v. Bryant*, 28 A. B. R. 867, 149 Ky. 359.

⁵⁸ See ante, § 2785; also see *Reeves v. McCracken*, 13 A. B. R. 680, 69 N. J. Eq. 203.

Claims for Conversions by Agents, Bailees, etc., Not Entitled to Priority (unless fund can be traced).—Such claims, even where not discharged, are not on that account entitled to priority of payment from the dividends. In *re Benedict*, 8 A. B. R. 463, 468, 38 N. Y. Misc. 230; *Clafin Dry Goods Co. v. Eason*, 2 A. B. R. 263 (Ref. Tex.): Unless the fund can be traced.

§ 2790. Judgment of State Court, How Far Res Judicata or Merger.—The character of the debt, whether contracted in a fiduciary capacity and therefore not dischargeable, is not controlled in the bankruptcy court by the recitals of the character as being “fiduciary” in the record of the judgment obtained thereon in the state court, unless the state court attached the same meaning to the term “fiduciary” that the bankruptcy court attaches thereto.⁵⁹ Nor does the judgment effect such merger that its silence will prevent inquiry as to its original nature.^{59a}

DIVISION 6.

DISCHARGE OF PARTNERSHIP AND INDIVIDUAL DEBTS.

SUBDIVISION “A.”

DISCHARGE OF PARTNERSHIPS.

§ 2791. Partnerships Entitled to Discharge.—Partnerships are entitled to discharge and may be denied discharge, the same as individuals.

§ 2792. No Individual Discharge of Member unless Individually Adjudged Bankrupt.—There can be no discharge of the individual member unless the member be individually adjudicated bankrupt.⁶⁰

In *re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.): “Moreover, since the property of the unadjudicated partners does not vest in and may not be administered by the trustee of the bankrupt partnership, the discharge of the partnership discharges that entity only from its debts, and leaves the partners still subject to their liability to pay the unpaid balance of the claims of the partnership creditors.” But it is possible that the court, though arriving at the correct conclusion in this case, bases it upon an improper ground, as to which compare, ante, §§ 65, 477½, 2232.

§ 2793. Act of One Bars Firm Discharge, if Done within Scope of Partnership Business.—The act of one partner, if done within the scope of the partnership business, will be imputed to all.⁶¹

59. *Knott v. Putnam*, 6 A. B. R. 80, 107 Fed. 907 (D. C. Vt.): This case, in substance, held, that, where in an action in a state court upon such a debt, the judgment recites that “the sum of which this judgment was rendered was received, and held by the defendants in a fiduciary capacity for the plaintiff,” and “that the cause of action arose from the willful and malicious act of the defendants, and that they ought to be confined in close jail,” this decision is conclusive in a court of bankruptcy only as to the matters before the state court for decision, including whether the plaintiff there was entitled to recover, and for how much, and whether he was entitled to a close-jail certificate under

the state statutes, but does not affect the right of the bankruptcy court to determine whether execution awarded with the certificate upon it should be used for imprisoning the bankrupts to compel payment, and the bankruptcy court has jurisdiction and authority to stay the arrest of the bankrupts upon such execution.

Apparently contra, *Burnham v. Pidcock*, 5 A. B. R. 590, 68 N. Y. Supp. 1007. Compare, ante, §§ 2749, 2756½.

59a. Compare ante, §§ 2749, 2754½.
60. In *re Pincus*, 17 A. B. R. 331, 147 Fed. 621 (D. C. N. Y.); In *re Hale*, 6 A. B. R. 35, 107 Fed. 432 (D. C. N. Car.).

61. Compare, In *re Hamilton*, 13 A. B. R. 333, 133 Fed. 823 (D. C. N. Y.).

Obiter, In re Schultz, Jr., 6 A. B. R. 91, 109 Fed. 264 (D. C. N. Y.): "Where there is fraud in partnership transactions within the scope of the partnership, in which each partner acts as the agent or representative of all the copartners, the fraud of one is usually imputed to all. * * * This principle was applied by the Supreme Court in the case of *Strang v. Bradner*, 114 U. S. 555, in holding a discharge insufficient to protect innocent partners from a debt fraudulently incurred by their co-partner."

Thus, a partnership may be barred of discharge by a false statement in writing to obtain credit made by one of the partners within the scope of the partnership business, although such false statement would not be a bar to the individual discharge of another partner who is innocent.⁶²

SUBDIVISION "B."

DISCHARGE OF PARTNERSHIP DEBTS IN INDIVIDUAL BANKRUPTCY OF A MEMBER.

§ 2794. Discharge of Firm Debts in Individual Bankruptcy of Member.—There are different rulings as to the effect of a discharge granted in an individual bankruptcy upon partnership debts of a firm to which the bankrupt belonged.⁶³ Some courts have held that where there are firm debts and firm assets, the discharge in the individual bankruptcy does not operate to release the bankrupt from the firm debts.⁶⁴

Other courts have held that, where there are no firm assets and all the partners are insolvent, the firm debts are discharged as against the partner by his individual bankruptcy.⁶⁵

Obiter, In re Hirsch, 3 A. B. R. 348, 97 Fed. 571 (D. C. N. Y.): "* * * in my own judgment a partner may at his option proceed upon his individual petition for his own adjudication and discharge without reference to the other partners, as under the Act of 1867 (In re Abbe, 2 N. B. R. 75, Fed. Cas. No. 4; In re Marks, Fed. Cas. No. 9,094; *Crompton v. Conkling*, 15 N. B. R. 417, 420, Fed. Cas. No. 3408; * * *), where all are insolvent and there are no firm assets whatever, inasmuch as partnership debts are all several, as well as joint."

⁶². *Frank v. Michigan Paper Co.*, 24 A. B. R. 261, 776 Fed. 179 (C. C. A. Md.), quoted at § 2563.

⁶³. For interesting discussion of the law on this point as it stood before the passage of the present act, see the editor's note to the case *In re Freund*, 1 A. B. R. 31.

No Cancellation of Judgment against Partnership Where Individual Partner Alone in Bankruptcy.—In re Gruber, 21 A. B. R. 467, 129 App. Div. N. Y. 297.

⁶⁴. In re Meyers, 2 A. B. R. 707, 96 Fed. 408 (D. C. N. Y.): Indeed, in this case the judge refused to grant discharge. It would seem he had no right to refuse to grant discharge on such grounds, but should at least have

granted it and left its effect as an effective release to be determined when the debts were sought to be enforced.

To same effect, compare, In re Meyers, 3 A. B. R. 260, 97 Fed. 757 (D. C. N. Y.); *Dodge v. Kaufman*, 15 A. B. R. 542 (Sup. Ct. N. Y.).

Compare apparently to same effect under the law of 1867: *Amsinck v. Bean*, 22 Wall 405; In re Winkens, 2 N. B. Reg. 349, Fed. Cases 17,875; In re Shepard, 3 N. B. Reg. 172, Fed. Cases 12,754; *Crompton v. Conklin*, 15 N. B. Reg. 417, Fed. Cases, 3,407, 3,408.

⁶⁵. See also, under act of 1867, In re Downing, 3 N. B. Reg. 748, Fed. Cases No. 4,044.

Contra, *In re Morrison*, 11 A. B. R. 498, 127 Fed. 186 (D. C. Tex.): "Assuming, as the bankrupt claims, that he seeks a discharge from partnership debts, his purpose cannot be accomplished in this proceeding, although it may be true, as insisted, that the firm no longer exists, that it is without assets, and that the firm debts are barred by limitation."

And still others hold that, where there are no assets and the firm is dissolved, a discharge in an individual bankruptcy will release firm debts.⁶⁶

Still other courts hold that the operation of the discharge can be regulated by the decree of discharge itself.

As noted, ante, § 2664, the effect of the discharge upon a particular debt is in general to be determined at the time it is sought to enforce the debt, and is not to be regulated in the discharge decree itself; and the sole function of the court is to grant or to refuse the discharge, leaving the effect of its decree to be thus determined later; there being the single apparent exception of those cases where there has been a former decree refusing a discharge, which, being *res judicata* as to the right to a discharge rather than as to its effect, should be pleaded in opposition to the discharge itself and the discharge decree, in that instance, be so modified as to except the former debts.⁶⁷

Still other courts hold that, unless the individual bankrupt schedules all firm debts and makes his partner a party, the discharge will be granted only with the limitation that it shall not affect firm debts.⁶⁸

And still other courts have held, that in no event can a partner in his individual bankruptcy proceedings obtain a discharge from debts of a partnership of which he was a member, unless his partner be "made a party."⁶⁹

Compare, query, obiter, *Jarecki Mfg. Co. v. McElwaine*, 5 A. B. R. 751, 754, 107 Fed. 249 (C. C. Ind.): "It is not necessary to determine whether, as intimated in a number of cases cited by counsel for the plaintiff, if objection had been made pending the bankruptcy proceeding on the ground that the other partner had not been made a party, the court would have ordered that to be done, and upon a failure to comply with such order, would have dismissed the proceeding or refused a discharge."

And unless the partnership itself also be adjudicated bankrupt.⁷⁰ But it was held, he might amend to bring in the partner.⁷¹

Still other courts have held that where an individual's bankruptcy petition is silent as to the existence of firm creditors, and so also are the

66. *Berry Bros. v. Sheehan*, 17 A. B. R. 325, 115 App. Div. N. Y. 488.

67. See ante, §§ 2664, 2665, 2666.

68. *In re Morrison*, 11 A. B. R. 498, 127 Fed. 186 (D. C. Tex.). Apparently, also, see *In re Carmichael*, 2 A. B. R. 815, 96 Fed. 594 (D. C. Iowa). Also, *In re Laughlin*, 3 A. B. R. 1, 96 Fed. 589 (D. C. Iowa). Compare, *In re Hartman*, 3 A. B. R. 65, 96 Fed. 593 (D. C. Iowa). But note *In re Mc-*

Faun, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa). Stating the truer rule.

69. *In re Freund*, 1 A. B. R. 25 (Ref. Iowa): This was a case where neither the bankrupt nor the partnership had any assets.

70. Query, obiter, *In re Levy*, 2 A. B. R. 27, 95 Fed. 812 (Ref. N. Y.); *In re Ottoman*, 2 A. B. R. 407, 95 Fed. 263 (D. C. N. Y.).

71. *In re Freund*, 1 A. B. R. 25 (Ref. Iowa).

notices to creditors, the discharge will be granted, but it will be at the risk of its being ineffectual to bar firm debts. This states the correct rule as to the granting or withholding of the discharge itself.⁷²

§ 2795. Individual Liability for Firm Debts, Discharged if Firm Debts "Duly" Scheduled in Individual Bankruptcy, Irrespective of "Firm Assets," etc.—The true doctrine, however, seems to be that partnership debts are discharged by the individual bankruptcy, provided they have been duly scheduled—that is to say, properly described—and provided they have been so scheduled in time for proof and allowance, and with the name of the creditor, if known, etc., or if the firm creditors have had actual knowledge of the bankruptcy; that the limits of the discharge as to its effect upon particular debts may not be determined in advance by qualifying the decree (save and except as to debts in existence when any former discharge was refused): that its limits must be left to the determination of the court wherein it is sought to enforce the old debt; that the bankruptcy court has ample power to require the firm debts and assets to be "duly scheduled" to the end that partnership creditors may have full notice; and that all this is irrespective of the question as to whether there are or are not firm assets, the firm assets being subject to such administration as is granted by § 5 and being properly regarded in much the same light as any other assets in which the bankrupt may have a joint interest with others.^{72a}

Deaf & Dumb Institute v. Crockett, 17 A. B. R. 240, 117 App. Div. N. Y. 269: "It is evident that an individual may be a member of a solvent firm and at the same time be insolvent himself.

"This rule shows quite clearly that the firm cannot be declared insolvent unless it is such in fact. In such circumstances, unless, therefore, the individual may by his own petition obtain a discharge in bankruptcy, even though insolvent, he could obtain no relief under the Bankruptcy Act.

"Where a firm is solvent and an individual member thereof is insolvent and desires to be discharged in bankruptcy, it is manifest that he is entitled to such discharge and that the business of the firm should be wound up and his surplus interest applied in liquidation of his individual debts. * * *

"It would therefore seem clear that an individual member of a firm may, on his own independent application, made in his own right, obtain a discharge not only from his individual debts but from his firm liabilities, and that the existence or nonexistence of firm assets is immaterial to the decision of this question. This view was expressed by the Supreme Court of Wisconsin in *Curtiss v. Woodward* (supra); but it is opposed by many cases in the Federal District Courts and some in this district which appear to be to the effect that the discharge may be complete or only partial, and that it is complete against all creditors when the firm is adjudged bankrupt or there are no firm assets and the firm debts have been scheduled as such, but partial only and limited to the individual creditors when the individual alone is adjudged bankrupt, and especially if there are firm assets. (In *re Kaufman*, 14 A. B. R. 393, 136 Fed. 262; In *re Avve*, 2 N. B. R. 75; In *re Knight*, 8 N. B. R. 436; *Hudgins v. Lane*, et

⁷². In *re McFaun*, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa).

^{72a}. Compare In *re McFaun*, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa).

al., No. 6,827, vol. 12, Fed. Cas., p. 800; *Matter of Feigenbaum*, 7 Am. B. R. 339; *In re Conkling, et al.*, No. 3,408, vol. 6, Fed. Cas. p. 850, and *id.* No. 3407, vol. 6, Fed. Cas. 848; *Trimble v. More*, 47 Supr. Ct. 340; *In re Hirsch, et al.*, 3 Am. B. R. 344, 97 Fed. 571; *Dodge v. Kaufman*, 15 Am. B. R. 542, 46 Misc. 248, following *In re Myers*, 3 Am. B. R. 260). It is difficult to reconcile this view if it relates to a discharge granted in the general language of the statute with the plain mandatory language of § 17 of the Bankruptcy Act, that 'a discharge in bankruptcy shall release a bankrupt from all of his provable debts' with certain exceptions not here involved. Since partnership debts are provable against a bankrupt's individual estate it is difficult to see why they are not discharged by a discharge which follows the language of the statute. It appears to me to be a question of jurisdiction, and that where, as in this case, the bankruptcy court acquired jurisdiction and granted a complete discharge under the statute, without attempting to make any reservation, that it should be given effect as such.

"It may well be that if the adjudication and discharge in bankruptcy are expressly limited to the individual debts that the discharge would not relieve the bankrupt from liability on firm obligations, and if that is what is meant by the decisions on that subject, to which reference has been made, they are doubtless sound. * * * It was doubtless competent for the Supreme Court of the United States by virtue of the authority conferred by § 16 of the Bankruptcy Act, to prescribe that a petitioner should state in his petition whether or not he is a member of a copartnership the business of which has not been finally settled, and if so, his interest therein, and whether there are firm creditors from whom he seeks a discharge, and firm assets unadministered which could then be reached under subdivision 'h' of § 5; and doubtless the bankruptcy court could adopt rules on the same subject not inconsistent with those adopted by the Supreme Court. The Supreme Court has prescribed forms for petitions by individuals and for petitions by copartnership firms, but I find no provision in these forms requiring that in an individual petition it must be set forth whether the applicant is a member of a copartnership firm, and I find nothing in the rules prescribed by the Supreme Court on the subject, or dealing with the subject of whether in any circumstances the discharge may be partial and not complete. I am of opinion, therefore, that no question of jurisdiction is presented, and that, at most a suspicion is cast on the regularity of the petitioner's bankruptcy proceedings according to some of the Federal decisions; but even that depends upon there being a partnership business which has not been finally settled and on this judgment being a partnership obligation. In these circumstances I think the true rule is, and that the tendency of the decisions in the State courts, at least, is toward holding that where the court acquires jurisdiction and grants a full discharge in the language of the statute from all provable debts properly scheduled, not specially excepted, that joint as well as individual debts are discharged."

§ 2796. Firm Debts Provable Debts of Each Member, and so Far as Affect Individual, Are Discharged by Individual's Discharge.

—Firm debts are provable debts also of each member as an individual bankrupt, and the creditors of a partnership are also creditors of each partner; and the partnership debts are discharged, so far as they are individual liabilities, by that partner's discharge in individual bankruptcy proceedings.

It is now beyond question that firm debts are provable against a part-

ner in individual proceedings, and consequently dischargeable therein.⁷³

Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249, 5 A. B. R. 751 (C. C. Ind.): "There is some disagreement in the authorities as to whether a discharge of an individual partner releases him from liability upon partnership debts. The great weight of authority is in favor of the doctrine that the discharge of a partner on his individual petition operates as a release alike from his individual and his partnership indebtedness. The cases which hold to the contrary seem to be based upon a misconception of the extent of the rights of a trustee over the bankrupt's estate, and as to the effect upon the firm of the bankruptcy of one of its members. The cases holding that discharge granted to one member of a firm does not release him from partnership indebtedness, where he alone is adjudged a bankrupt, proceed on the principle that the trustee could not acquire possession of and administer the assets of the firm. In so holding it seems to have been overlooked that the bankruptcy of one member is ipso facto a dissolution of the firm, and that, while the solvent partner would be allowed to administer the partnership assets, yet the trustee in bankruptcy is entitled to the bankrupt's share of the partnership assets after the payment of the partnership debts. The separate estate of the bankrupt partner, and his beneficial interest in the firm after the payment of firm debts, is to be administered by the trustee for the payment of the bankrupt's individual debts. The adjudication of one partner as a bankrupt brings within the jurisdiction of the court his entire estate for administration, and if, after the payment of his individual debts out of his individual estate, any surplus remains, it will be applicable to the payment of firm indebtedness. For the purpose of reaching any such surplus, firm creditors may prove against the estate of the bankrupt partner * * * and, * * * the discharge of one partner releases him from all partnership indebtedness. The provision of § 5, par. 'h,' of the Act of 1898, that where one member of a firm, but not all, becomes bankrupt, the partners not adjudged bankrupt shall wind up the business and account to the trustee for the bankrupt's share in the firm, although it introduces no new rule of law, does, however, clearly show that all the bankrupt's property—his individual assets as well as his beneficial interest in the partnership assets—passes to the trustee. As that section provides a means for reaching this beneficial interest, there would seem to be no reason for refusing a bankrupt a discharge which will release him from his partnership liability on the ground that his partnership assets are not assigned to and controlled by his trustee, to be used for the benefit of the partnership creditors, because the trustee having a right to his beneficial interest in the partnership assets, and the bankrupt law providing a means for the collection of that interest, everything in which the partnership creditors might have a pecuniary interest passes to the trustee by virtue of the adjudication of the partner as a bankrupt. It would seem to be impossible to consider the provisions of § 5, par. 'h,' with the general intent of the law to release a bankrupt from all his indebtedness existing at the time of the commencement of the proceedings in bankruptcy, and especially with the provisions of § 16,

73. See ante, "Distribution in Partnership Cases," § 2230, et seq. Impliedly, *In re Hartman*, 3 A. B. R. 65, 96 Fed. 593 (D. C. Iowa); impliedly, *In re McFaun*, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa); *Deaf & Dumb Inst. v. Crockett*, 17 A. B. R. 240, 117 App. Div. N. Y. 269; compare, analogously, *In re Bates*, 4 A. B. R. 56, 100 Fed.

263 (D. C. Vt.); [1867] *In re Downing*, 3 N. B. Reg. 784, Fed. Cases 4,044; [1867] *In re Stevens*, 5 B. Reg. 112, Fed. Cases 13,393; [1867] *In re Frear*, 1 B. Reg. 663, Fed. Cases 5,074; [1867] *In re Grady*, 3 B. Reg. 227, Fed. Cases 5,654; [1867] *In re Abbe*, 2 B. Reg. 75, Fed. Cases 4; [1867] *In re Leland*, 5 B. Reg. 222.

providing that the release of the bankrupt by a discharge shall not alter the liability of a partner of the bankrupt, without reaching the conclusion that one member of a firm may be adjudged a bankrupt, that the partnership creditors may prove their claims against his estate, and that a discharge granted to one member of a firm releases him from all partnership as well as individual indebtedness. And this result seems to be fortified by § 5, par. 'g', providing that the court may permit the proof of the claims of the partnership estate against the individual estate, and vice versa, and may marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure an equitable distribution of the property of the several estates.

Loomis v. Wallblom, 13 A. B. R. 687, 94 Minn. 392: "The discharge did not purport to forever release the bankrupt from all his debts and liabilities, but only from all such 'debts and claims' as were by said Bankruptcy Act 'made provable against his estate.' That the debt was one which might have been proved in bankruptcy proceedings against the estate of the individual partner is evident from the whole tenor of the law, and especially from chapters 1, 3, §§ 1, 4, 30 Stat. 544, 547, * * * chapter 3, §§ 4, 5, of that law, 30 Stat. 547. * * * See, also, § 16, 30 Stat. * * * Indeed, subdivision 'g' of said § 5 expressly provides that the court may 'permit' the proof of the claim against the individual estates and vice versa and may marshal the assets of the partnership estates and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." * * *

"Such a judgment as the one here sought to be extended, filed in the bankruptcy proceedings, might under appropriate conditions, have been paid in full or in part by the application thereto of the whole or a proper part of the funds in the hands of the respondent's trustee in separate bankruptcy proceedings. Its full discharge as an individual liability on a firm debt may accordingly be had in bankruptcy proceedings."

In re Kaufman, 14 A. B. R. 393, 136 Fed. 262 (D. C. N. Y.): "The judgment obtained against him was a personal judgment against himself and his partner on account of the indebtedness contracted by him and his partner in the course of partnership business. Both the indebtedness and the judgment subjected to its payment the assets of the firm, and the individual property of each debtor against whom the judgment was recovered. Therefore Kaufman was a judgment debtor, first, as a partner of the firm; second, as an individual. The petition in bankruptcy was not for the purpose of procuring the administration of the assets of the firm, as a distinct entity, nor for the purpose of procuring the discharge of the firm as such; but it was for the purpose of administering the personal assets of a person, who was a partner, and for the discharge of such persons from all debts against him as an individual, however such debts were created. * * * The order of discharge would provide for his discharge, as an individual, from any individual responsibility growing out of the partnership liability."

[1867] *Wilkins v. Davis*, 15 B. Reg. 60, Fed. Cas. 17,664: "It has been announced of late, chiefly in dicta, that all the members of a firm must become bankrupt in order that the assignees should be able to deal with the joint stock, or that a discharge should be obtained from joint debts. *In re Little*, 1 B. R. 341; 2 Ben. 186; Fed. Cas. No. 8390; *In re Winkins*, 2 id. 349; S. C., Fed. Cas. 17,875; *Hudgins v. Lane*, 11 id. 462; 12 Hughes 361; S. C., Fed. Cas. 6,827. Such, however, is not the law, as I understand it. First. It has been settled for more than a century and a half, that if one member of the firm becomes bankrupt and obtains his discharge, he is released from all his debts joint and separate. *Ex p. Yale*, 3 P. Wms. 24 note A. This leading case is the law of England today; it has not been necessary to reaffirm it; but the doctrine has been acted on and

applied in various ways. Where the bankrupt was a member of a company which was for some purpose a partnership, the court extended the rule to him. *Thomas v. Harding*, 3 C. B. (N. S.) 254. So the proceedings and pleadings in such cases have repeatedly recognized the law that one partner is discharged by his separate certificate; such as *Bovill v. Wood*, 2 Maule & S. 23; *Noke v. Ingham*, 1 Wils. 89; *Booth v. Middlecoat*, 6 Bing. 445. In this last case, it does not distinctly appear whether the bankrupt was a partner or a joint contractor, but the very absence of information shows the point to be immaterial. See *Lindley, Partnership*; *Collyer, Part.* (5th Am. Ed.), § 858; *Mont. & Ayr. Bankrupt Law* (2d Ed.), 748; 1 *Deacon*, id. 797; *Robson*, id. (2d Ed.) 554. If a creditor who had proved his debt against a bankrupt partner, brought an action at law against the solvent members of the firm, and joined the bankrupt as a defendant, which at law he was bound to do, for reasons not now necessary to be stated, yet the Lord Chancellor would require him to give security to the bankrupt against all damages and costs. *Ex p. Read*, 1 *Rose*, 460; *Ex p. Stanton*, 1 M. D. & De G. 273. Not only will the joint creditors be bound, but the bankrupt's co-partners equally; because they may pay the joint debts and prove against the bankrupt's estate the equitable debt arising from any deficiency in his accounts. *Wood v. Dodgson*, 2 Maule & S. 195; *Affalo v. Foudrinier*, 6 Bing. 306; *Butcher v. Forman*, 6 Hill 583. Second, It is equally well settled, and is a necessary part of the theory, that the bankruptcy of one partner dissolves the partnership, except for the purpose of closing their affairs, and that the assignee is tenant in common with the solvent partner of the joint stock. It usually happens that the latter will be in possession of the stock, and his possession will not be disturbed excepting for good reason; and, on the other hand, if, in this case, the assignee is in possession, he will not be disturbed without good cause. A court of equity has undoubted power to intrust either the solvent partner or the assignee with the exclusive control of the settlement; but if no order is made, the assignee, having possession, will go on and collect the joint assets, and pay the joint debts, by way of dividends to those joint creditors who come in and prove. See *West v. Skip*, 1 Ves. (Sen.) 239; *Dutton v. Morrison*, 17 Ves. 193; *Murray v. Murray*, 5 Johns. Ch. 60; *Parker v. Muggridge*, 2 Story 334; *Ayer v. Brastow*, 5 Law Rep. 498; *Amsinck v. Bean*, 11 N. B. R. 495; 22 Wall 395; S. C., 10 Blatch 361.

"It is argued that the assignee of one partner cannot interfere with the affairs of the firm, unless the decree in bankruptcy or the assignment expressly confers upon him such right or conveys to him such a title. But no point of the sort was taken in any of the cases above mentioned. On the contrary, the facts in all of them simply show that one partner was bankrupt. This, of necessity, disposes of all his property, and one part of that is his interest in any firm or any number of firms of which he was a member. It seems to be thought that one may be bankrupt and not bankrupt at the same time; bankrupt as an individual and not so as a member of a firm. This is impossible. A man may be bankrupt when the other members of his firm are solvent, and when the joint assets are in excess of the joint debts, because he may owe separate debts beyond the amount of his separate property added to his share in a solvent joint business. In such a case, the assignee may properly make a settlement with the solvent partner, by which the joint debts are paid by the latter, and the value of the bankrupt's interest in the firm is paid over to the assignee for distribution among his separate creditors. If the balance is against the bankrupt, the solvent partner, upon paying the joint debts, could have proved for it, and have received a dividend from the separate estate, as I have already shown. But the partner would be no less bankrupt in either case, and his assignee would have

no other or different title, so far as his estate was concerned, than if all the members of the firm were bankrupt."

§ 2797. But Partnership Debts to Be "Duly Scheduled," Else Not Affected by Individual Discharge.—But partnership debts are not discharged by the discharge granted in the individual proceedings of one partner, unless the partnership debts have been "duly" scheduled; that is to say, aptly described with addresses duly given, under the limitations heretofore laid down.⁷⁴

And the question as to whether firm debts will be discharged in individual bankruptcies is really more one of "due" scheduling than anything else.

Impliedly, In re Laughlin, 3 A. B. R. 1, 96 Fed. 591, 592 (D. C. Iowa): "To avoid this result, provision is made in the last clause of § 5 for adjudging a part only of the members of a firm to be bankrupt, and a mode is provided for reaching their interest in the partnership property and subjecting it to administration by the Bankruptcy Court; and, as the act has thus made provision for giving to the creditors the benefit of the bankrupt's interest in the firm property and business, the bankrupt partners will be entitled to a discharge effectual against the firm creditors. To become entitled, however to a discharge barring the firm creditors, under such circumstances, the proper foundation must be laid in the proceedings instituted on behalf of the bankrupt partner. In the petition originally filed it should be averred that the petitioner is indebted in his individual capacity, if such be the fact, and also as a member of a firm, naming it, and giving the names of the several partners; and the petition should pray for a discharge from the firm as well as his individual debts. To this petition should be attached the proper schedules, setting forth the firm debts, the firm property, if any, and all other matters, the same as is required in the case of a proceeding brought by all the partners. Schedules of the individual property and debts should also be attached to the petition. In the notice to the creditors to attend the first meeting, it should be stated that the firm, as well as the individual creditors, are notified to attend, as the bankrupt is seeking a discharge from both classes of claims; and also in the petition for a discharge a release from the firm as well as the individual debts should be asked; and in the notice to creditors of the filing and hearing upon the petition for discharge the fact that a release from the firm debts is prayed for should be specifically set forth. Notice of the filing of the petition and of the creditors' meetings should be sent to the nonjoining partner or partners, in order that, if necessary, they may appear and protect their rights and interests in the proceedings. The attention of the referees in this district is called to this matter, and they are instructed that it is their duty to examine all petitions referred to them, and, if it appears that the bankrupt is seeking a discharge from firm as well as individual debts, then, if necessary, the petition and schedules must be amended so as to comply with the foregoing requirements before the adjudication is entered thereon; and care must be taken, in framing the notices to creditors, that they conform to the views herein expressed."

Inferentially, In re Morrison, 127 Fed. 186, 11 A. B. R. 498 (D. C. Tex.): "Under § 5, clause 'h,' of the Bankrupt Act of July 1, 1898, a part only of the

⁷⁴. Impliedly, In re Meyers, 3 A. B. R. 260, 2 N. B. N. & R. 111 (D. C. N. Y.); compare, In re Kaufman, 14 A. B. R. 393, 1136 Fed. 262 (D. C. N. Y.); impliedly, Deaf & Dumb Inst. v. Crockett, 17 A. B. R. 240, 117 App. Div. N. Y. 269.

members of a firm may be adjudged bankrupt; but such a proceeding should be predicated upon appropriate pleadings, with proper parties, and creditors should have due notice that partnership effects are being administered, and that a discharge is sought from partnership indebtedness."

§ 2798. And Notices to Creditors Must Give Notice of Firm Debts and That Discharge Therefrom Sought.—Unless the notices to creditors give notice of the firm debts, and that discharge therefrom is sought, firm debts will not be discharged.⁷⁵

In re Morrison, 11 A. B. R. 499, 127 Fed. 186 (D. C. Tex.): " * * * and creditors should have due notice that partnership effects are being administered and that a discharge is sought from partnership debts."

But it is a question whether it is necessary to mention that they are firm debts and specifically to name the firm.⁷⁶

§ 2799. Petitions for Adjudication and Discharge Each to Mention Firm Debts and Pray for Discharge Therefrom.—The petition for adjudication, and the petition for discharge also, should mention the firm debts and pray for their discharge.⁷⁷

§ 2800. And Firm Property to Be Described.—And the firm property must also be described. It is like other property in which the individual bankrupt may have a joint interest.⁷⁸

§ 2801. Amendment to Include Discharge from Firm Debts, Where Already Duly Scheduled.—But if, in an individual bankruptcy, firm debts have been duly scheduled, the discharge decree may be so amended as to show that the bankrupt is discharged as an individual from any individual liability on account of the debts of the firm.⁷⁹

§ 2802. Even after Term at Which Discharge Granted.—And such amendment may be made after the term at which the discharge was granted.⁸⁰

75. In re Russell, 3 A. B. R. 91, 97 Fed. 32 (D. C. Iowa). But compare, In re Kaufman, 14 A. B. R. 393, 136 Fed. 262 (D. C. N. Y.); In re Hartman, 3 A. B. R. 65, 96 Fed. 593 (D. C. Iowa); In re McFaun, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa).

76. Compare, apparently to effect that it is not, Deaf & Dumb Inst. v. Crockett, 17 A. B. R. 240, 117 App. Div. N. Y. 269.

77. In re McFaun, 3 A. B. R. 66, 96 Fed. 592 (D. C. Iowa); In re Russell, 3 A. B. R. 91, 97 Fed. 32 (D. C. Iowa); In re Meyers, 3 A. B. R. 260, 2 N. B.

N. & R. 111 (D. C. N. Y.); In re Morrison, 11 A. B. R. 499, 127 Fed. 186 (D. C. Tex.). But compare, In re Kaufman, 14 A. B. R. 393, 136 Fed. 262 (D. C. N. Y.). But compare, that no such rule prescribed, Deaf & Dumb Ins. v. Crockett, 17 A. B. R. 240, 117 App. Div. N. Y. 269.

78. In re Hartman, 3 A. B. R. 65, 96 Fed. 593 (D. C. Iowa).

79. In re Kaufman, 14 A. B. R. 393, 136 Fed. 262 (D. C. N. Y.).

80. In re Kaufman, 14 A. B. R. 393, 136 Fed. 262 (D. C. N. Y.); In re Diamond, 17 A. B. R. 563 (C. C. A. N. Y.).

SUBDIVISION "C."

DISCHARGE OF INDIVIDUAL DEBTS IN PARTNERSHIP BANKRUPTCIES.

§ 2803. Where Individuals Adjudged Bankrupt with Partnership, Individual Debts Discharged.—Where the individual members of the partnership have been adjudged bankrupt along with the partnership itself, they may be discharged from their debts as individuals.

§ 2804. Where Not So Adjudged, Individual Debts Not Discharged.—Where the individual members of the partnership have not been adjudicated bankrupt along with the partnership itself, the partnership discharge will not effect a discharge from their debts as individuals.⁸¹

In *re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.): "Moreover, since the property of the unadjudicated partners does not vest in and may not be administered by the trustee of the bankrupt partnership, the discharge of the partnership discharges that entity only from its debts, and leaves the partners still subject to their liability to pay the unpaid balance of the claims of the partnership creditors."

SUBDIVISION "D."

DISCHARGE OF INDIVIDUAL PARTNER WHERE PARTNERSHIP AND REMAINING PARTNERS NOT DISCHARGED.

§ 2805. Individual Partner May Be Discharged, Where Firm and Other Partners Not.—An individual partner may receive his discharge, although the partnership and remaining partners are not discharged.

In *re Meyers*, 3 A. B. R. 260, 2 N. B. N. & R. 112, 97 Fed. 757 (D. C. N. Y.): "It is argued that under § 5 of the present act, an individual petition for a separate discharge after an adjudication of the firm, cannot be maintained. I do not appreciate the force of this contention, and must overrule it. If it were sound, it would follow that in no case of a firm adjudication could an honest partner be discharged, if a discharge was denied to his copartner on account of the latter's wrong, though the former was in no way privy to it. This would be plainly contrary to the evident purpose of the sections of the act relating to discharges, and no such construction of section 5 seems in the least necessary."

81. In *re Hale*, 6 A. B. R. 35, 107 Fed. 432 (D. C. N. Car.).

CHAPTER LIV.

REVOCATION OF DISCHARGE.

Synopsis of Chapter.

§ 2806. Revocation of Discharge.

DIVISION 1.

§ 2807. "Parties in Interest," Alone, May Move to Revoke.

§ 2808. Includes Creditor Who Has Failed to Prove Claim within Year.

§ 2809. Must Have Been Creditor at Time of Bankruptcy.

§ 2810. Purchaser of Discharged Claim Not Party in Interest.

§ 2811. Whether Court, Sua Sponte, May within Year Vacate Discharge Not on Merits.

§ 2812. Whether Bankrupt May Move to Vacate Discharge.

DIVISION 2.

§ 2813. Fraud in Procuring Discharge, Accompanied by Grounds for Barring It, Sole Ground.

§ 2814. Buying Off Opposition, Sufficient.

§ 2815. Applicant's Knowledge of Fraud at Time Discharge Granted, or Laches, Fatal to Revocation.

§ 2816. Ground for Barring Discharge Itself Must Also Exist.

§ 2817. Creditor Defeated in Opposition to Discharge May Not Move for Revocation on Same Grounds.

§ 2818. Vacating for Irregularities Not Going to Merits.

DIVISION 3.

§ 2819. Trial on Application for Revocation.

§ 2820. Before Judge, Not before Referee.

§ 2821. But May Be Referred to Special Master.

§ 2821½. Petition Must Be in "Bankruptcy Court."

§ 2822. Petition to Set Forth Facts Showing Grounds for Revocation, but Need Not Allege Discharge "Not Warranted."

§ 2823. Amendment.

§ 2824. Revocation to Be Applied for within Year after Discharge Granted.

§ 2824½. Whether Appeal Lies.

§ 2806. Revocation of Discharge.—The discharge may be revoked upon the application of parties in interest, who have not been guilty of undue laches, filed within a year after the discharge was granted, upon trial, if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.¹

1. Bankr. Act, § 15; In re Meyers, 3 A. B. R. 722, 100 Fed. 775 (D. C. N. Y.); In re Oleson, 7 A. B. R. 22, 110

Fed. 796 (D. C. Iowa), quoted post, § 2815; In re Oliver, 13 A. B. R. 582, 133 Fed. 832 (D. C. N. J.), quoted

DIVISION 1.

WHO MAY MOVE TO REVOKE DISCHARGE.

§ 2807. "Parties in Interest," Alone, May Move to Revoke.—"Parties in interest," and only they, may move to revoke a bankrupt's discharge.²

§ 2808. Includes Creditor Who Has Failed to Prove Claim within Year.—A creditor who did not prove his claim within the year from the adjudication of bankruptcy, and therefore could not share in dividends, nevertheless is a party in interest, and may maintain an application to revoke a discharge.³

§ 2809. Must Have Been Creditor at Time of Bankruptcy.—The applicant must have been a creditor at the time of the bankruptcy, not the assignee of a discharged claim, nor a subsequent creditor.

In *re Chandler*, 14 A. B. R. 512, 138 Fed. 637 (C. C. A. Ills.): "The averment in the petition that the objectors are creditors is not such a statement as shows to the court that the petitioners are 'parties in interest,' within the meaning of the law. The petition does not make such a showing that the court can say that the rights of the petitioners were affected by the discharge. No facts were averred which would justify the legal conclusion that the petitioners are 'parties in interest.' It is not averred that they were creditors at the time of the bankruptcy. The character of their debt is not shown. It is not averred that their debt was provable in bankruptcy or was proved in the proceedings. The debt or debts they represent, from all that appears from the petition, may have been created since discharge, or they may have become purchasers of the debts which were discharged, without right to attack the discharge. We are of opinion that the petition should have shown that the petitioners had at the time provable debts against the bankrupt, which were affected by the discharge of the bankrupt. Otherwise they are not 'parties in interest,' within the meaning of the statute."

§ 2810. Purchaser of Discharged Claim, Not Party in Interest.—The assignee of a discharged claim is not such party in interest.⁴

§ 2811. Whether Court Sua Sponte May within Year Vacate Discharge Not on Merits.—It has been held, that the court sua sponte may vacate within a year its decree of discharge in order to let in parties to oppose the discharge.⁵

post, § 2816; In *re Upson*, 10 A. B. R. 758, 124 Fed. 980 (D. C. N. Y.), quoted post, § 2815; In *re Cuthbertson*, 29 A. B. R. 823, 202 Fed. 266 (D. C. S. D.).

2. Bankr. Act, ante, § 15.

3. In *re Bimberg*, 9 A. B. R. 601, 121 Fed. 942 (D. C. N. Y.); [1867] In *re Douglas*, 11 Fed. 403.

Creditor Not Scheduled nor Notified.—In one case it was held that it was not sufficient ground for opening up a discharge that one of the cred-

itors did not receive notice, In *re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

4. In *re Chandler*, 14 A. B. R. 512, 138 Fed. 637 (C. C. A. Ills.), quoted in preceding paragraph.

5. [1867] In *re Dupree*, Fed. Cases No. 4,183. Compare, analogously, practice in vacating compositions, *obiter*, Bank *v.* Doolittle, 5 A. B. R. 743 (C. C. A. Tex.).

Obiter, *In re Bimberg*, 9 A. B. R. 601, 121 Fed. 942 (D. C. N. Y.): "Moreover, a court of bankruptcy has generally power, like any other court, to amend its decrees, in its discretion at any time, in the furtherance of justice, in the absence of any statutory prohibition. * * * Undoubtedly a discharge cannot be vacated after a year has passed, but before a year has passed, the court, on its own motion, in my opinion, could vacate a discharge, if justice required it."

But this is different from revoking the discharge; for the revoking of a discharge is a direct finding that the discharge ought not to be granted at all, while the vacating of a discharge decree may be based solely upon grounds not going to the merits, and still leave the discharge ultimately to be granted.

§ 2812. Whether Bankrupt May Move to Vacate Discharge.—It is also a question whether the bankrupt, on good cause shown, may also be permitted to move for the vacating of his own discharge decree. It has been held that he may do so, if proper notice be given and third persons be not injured.⁶

But he may not do so, at any rate, for the purpose of permitting him to amend his schedules to include an omitted creditor after the expiration of the year in which the creditor might have filed his claim for allowance;⁷ nor without notice to the creditor.⁸

But it was held in one case that the bankrupts might have the discharge set aside in order to amend their schedules to include an omitted creditor where the bankrupts were claiming a counterclaim or offset to exist which in fact constituted their only asset.⁹

DIVISION 2.

GROUND FOR REVOKING DISCHARGE.

§ 2813. Fraud in Procuring Discharge, Accompanied by Grounds for Barring It, Sole Ground.—Fraud in the procuring of the discharge (accompanied with the existence of some one of the original grounds for barring discharge) is the only ground of revocation.¹⁰

6. *In re Shaffer*, 4 A. B. R. 728 (D. C. N. Car.). Impliedly, *In re Hawk*, 8 A. B. R. 71, 114 Fed. 916 (C. C. A.).

7. *In re Hawk*, 8 A. B. R. 71, 114 Fed. 916 (C. C. A.), distinguished in *In re Kaufman*, 14 A. B. R. 397, 136 Fed. 262, D. C. Pa.).

8. *In re Hawk*, 8 A. B. R. 71, 114 Fed. 916 (C. C. A.).

9. *In re McKee*, 21 A. B. R. 306, 165 Fed. 269 (D. C. N. Y.).

10. *In re Cuthbertson*, 29 A. B. R. 823, 202 Fed. 266 (D. C. S. D.); *In re Hasen*, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.). Compare, *In re Meyers*, 3 A. B. R. 260, 2 N. B. N. & R. 111 (D. C. N. Y.).

Instance held insufficient: Failure to schedule certain lands of which bankrupt had been dispossessed by order of the U. S. Land Office, which order, after his discharge, had been reversed, *In re Hansen*, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.).

Instance held insufficient: Conditional and personal right of purchase not an asset of the estate, *In re Hansen*, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.).

Instance held insufficient, creditor not notified but no fraud, *In re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

The fraud must have been actual and intentional.

In *re Wright*, 24 A. B. R. 437, 177 Fed. 578 (D. C. N. Y.): “* * * the fraud by which the discharge was obtained must have related to fraud theretofore knowingly practiced by the bankrupt. It must have been an actual fraud, such as could have been urged against the granting of the discharge.”

In *re Hoover*, 5 A. B. R. 247, 105 Fed. 354 (D. C. Pa.): “This is an application, under section 15 of the act, to revoke the discharge of a bankrupt; but there is this fatal defect in the proceeding: Neither by averment in the petition, nor by proof in the testimony that has been laid before me, does it appear that the discharge was ‘obtained through fraud of the bankrupt,’ and that ‘the knowledge of the fraud has come to the petitioners since the granting of the discharge.’ The averments of fraud contained in the petition relate to events occurring several years before the adjudication, and could properly be considered, if at all, only upon objection to the granting of the discharge. No doubt the petitioners intended to interpose such objections at the proper time, namely, within ten days after the time fixed for hearing the bankrupt’s application to be discharged; but for some reason no objections were filed, and the discharge was granted in due course. But it was not obtained by the bankrupt’s ‘fraud,’ in any sense of that word, and therefore is not subject to be revoked under the section now being considered.”

The willfully giving of a wrong address of a creditor, in order to get a discharge without the creditor’s knowledge, is such a fraud.¹¹

By this is not meant that the court may not set aside the order granting the discharge for irregularity, or for noncompliance with the rules of practice.

§ 2814. Buying Off Opposition, Sufficient.—The buying off of opposition is clearly sufficient ground for revoking the discharge.¹²

In *re Dietz*, 3 A. B. R. 316, 97 Fed. 563 (D. C. N. Y.): “There is no doubt that if the opposition of the creditor is bought off through the procurement or privity of the bankrupt, it is such fraud upon the act as would warrant vacating the discharge, the fact itself being *prima facie* evidence that the bankrupt was not entitled to it.”

§ 2815. Applicant’s Knowledge of Fraud at Time Discharge Granted, or Laches, Fatal to Revocation.—The applicant for revocation must not have had knowledge of the fraud in obtaining the discharge at the time the discharge was granted, nor must he have been otherwise guilty of laches.¹³

11. In *re Roosa*, 9 A. B. R. 531, 119 Fed. 542 (D. C. Iowa).

12. Analogously, In *re Steindler & Hahn*, 5 A. B. R. 63 (Ref. N. Y.); [1867] In *re Douglass*, 11 Fed. 403, 406; [1867] In *re Palmer*, 14 N. B. Reg. 437, Fed. Cas. No. 10,678; *Tuxbury v. Miller*, 19 Johns 311; *Blasdel v. Fowle*, 120 Mass. 447; *Bell v. Leggett*, 7 N. Y. 176; *obiter*, In *re Luftig*, 15 A. B. R. 778 (D. C. Mass.). Compare, § 2628, note.

13. Bankr. Act, § 15; impliedly, In *re Oliver*, 13 A. B. R. 582, 133 Fed. 832 (D. C. N. J.); In *re Meyers*, 3 A. B. R. 722, 100 Fed. 775 (D. C. N. Y.); *obiter*, In *re Shaffer*, 4 A. B. R. 730, 104 Fed. 982 (D. C. N. Car.).

Denials of laches in general terms on general averments of legal conclusions will not suffice; In *re Oleson*, 7 A. B. R. 22, 110 Fed. 796 (D. C. Iowa).

In *re Mauzy*, 21 A. B. R. 59, 163 Fed. 900 (D. C. W. Va.); impliedly, In

In *re Upson*, 10 A. B. R. 758, 124 Fed. 980 (D. C. N. Y.): "Again, it is not shown, assuming that the bankrupt was guilty of fraud in concealing facts, that the knowledge of such fraud has come to the petitioner since the granting of the discharge. It is true that certain officers of the bank have testified that they had no knowledge of certain facts proved before the referee; but it does not appear that other officers or that the board of directors did not have full knowledge, and in truth it would seem that the bank did have all the knowledge on the subject it cared for at the time. Having appeared to oppose the discharge, and having been given twenty days in which to file specifications in opposition, the bank was certainly guilty of undue laches in not filing its specifications and proceeding to produce evidence on the subject."

In *re Oleson*, 7 A. B. R. 22, 110 Fed. 796 (D. C. Iowa): "It is apparent that if the court should approve of the practice of allowing a creditor to attack a discharge months after its date, without making any substantial showing of facts to prove the absence of undue laches, it would open the door to unfair attacks upon the bankrupt on the part of single creditors, who would hope to force payment to them, in order to avoid the cost and possible injury to the bankrupt who may have entered into new business pursuits, which would be seriously affected if the question of his liability on the debts barred by the discharge were to be reopened. When, as in this case, the existence of the mortgage now claimed to be fraudulent was shown in the original schedules and the creditors do not question its validity during the pendency of the case and the discharge is granted, the court will not be justified in entertaining a petition for the revocation of the discharge, unless it is made clear that the creditor has not been guilty of laches; and that cannot be done by general averments of mere conclusions to the effect that the party has not been guilty of negligence, or has acted with due diligence. * * * No showing of facts is made explaining why the validity of this mortgage was not inquired into during the pendency of the proceedings. The evil that may result from allowing attacks upon the validity of a discharge months after it has been granted is apparent. The bankrupt, having received his discharge, will ordinarily engage in new business enterprises, and may become indebted to many persons, who, in good faith, extend credit to him in the belief that the discharge granted bars the pre-existing indebtedness, and their rights will be seriously affected if the discharge is revoked and held for naught."

Thus, failure without good cause to file specifications within the time limited will be such laches as will bar the right to revocation.¹⁴ And it has been held that notice of the fraud to the trustee is notice to each and all creditors.¹⁵

Thus, also, where creditors, before bankruptcy, had abandoned a suit to set aside the same fraudulent transfer now urged, and, during the bankruptcy, did not seek an examination of the bankrupt, nor oppose his discharge, they will be denied revocation.¹⁶

re Griffin Bros., 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.); instance, *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.); *Drees v. Waldron*, 31 A. B. R. 722, 212 Fed. 93 (C. C. A. Iowa); *In re Cuthbertson*, 29 A. B. R. 823, 202 Fed. 266 (D. C. S. D.); *In re Downing*, 28 A. B. R. 778, 199 Fed. 329 (D. C. N. Y.).

14. *In re Hoover*, 5 A. B. R. 247, 105 Fed. 354 (D. C. Pa.); *In re Upson*, 10 A. B. R. 758, 124 Fed. 980 (D. C. N. Y.); inferentially, *In re Oleson*, 7 A. B. R. 22, 110 Fed. 796 (D. C. Iowa).

15. *In re Hansen*, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.).

16. *In re Mauzy*, 21 A. B. R. 59, 163 Fed. 900 (D. C. W. Va.).

§ 2816. Ground for Barring Discharge Itself, Must Also Exist.

—But the fraud of the bankrupt in obtaining his discharge must have been accompanied with the existence of grounds themselves sufficient to have forbidden discharge in the first instance.¹⁷

In *re Oliver*, 13 A. B. R. 582, 133 Fed. 832 (D. C. N. J.): "But * * * it must further appear, in order to justify the court in vacating the order of discharge, that the actual facts did not warrant the discharge."

Thus, the bankrupt's omission to schedule property conveyed to his wife in fraud of creditors, although so conveyed to her more than four months before the bankruptcy, is such concealment of assets¹⁸ as will warrant revocation of the discharge.

On the other hand, where a referee in bankruptcy erroneously had held that commissions of a bankrupt insurance agent on renewal premiums accruing after bankruptcy, but earned on policies written beforehand, did not pass to the trustee, the collecting of commissions by the agent after the referee's decision and before its reversal was held not to be sufficient ground for revocation of the discharge, since it did not constitute a bar to the discharge the bankrupt having acted in reliance upon the correctness of the referee's ruling.¹⁹

§ 2817. Creditor Defeated in Opposition to Discharge May Not Move for Revocation on Same Grounds.—A creditor who has been

defeated in his opposition to the discharge, may not move for a revocation of it on the same grounds, but may impeach it for other and further instances of fraud newly discovered, the estoppel of the former decree being limited in this particular to the specifications that were passed upon.²⁰

§ 2818. Vacating for Irregularities Not Going to Merits.—The discharge decree may be vacated on other grounds also. Thus, courts always, in proper cases, may vacate their decrees if there is a sufficient violation of the rules of practice.²¹ For instance, where separate findings of

17. Bankr. Act, § 15; In *re Meyers*, 3 A. B. R. 722, 100 Fed. 775 (D. C. N. Y.); In *re Roosa*, 9 A. B. R. 531, 119 Fed. 542 (D. C. Iowa).

In *re Griffin Bros.*, 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.); In *re Downing*, 28 A. B. R. 778, 199 Fed. 329 (D. C. N. Y.); In *re Wright*, 24 A. B. R. 437, 177 Fed. 578 (D. C. N. Y.), quoted at § 2813. Compare, for case where the court evidently considered fraud alone sufficient, obiter, In *re Luftig*, 15 A. B. R. 778 (D. C. Mass.).

18. In *re Toothaker Bros.*, 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.).

19. In *re Wright*, 24 A. B. R. 437, 177 Fed. 578 (D. C. N. Y.), quoted at § 2813.

20. [1867] *Dowder v. Rowell*, 25 Vt. 336.

21. Compare, analogously the withholding of discharges and confirmation of compositions until rules are complied with, ante, §§ 2376, 2382, 2457.

And the court refused to vacate a discharge decree in one case where a creditor averred he had not received notice, and was not scheduled, there being no fraud shown. In *re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

The court will not vacate a discharge because the creditor has not actually received notice, it being shown that the notices had been properly mailed as required by the statute. In *re Downing*, 28 A. B. R. 778, 199 Fed. 329 (D. C. N. Y.).

fact and law were requested by the opposing creditors, but not made, the discharge should be vacated for that purpose.²² But such vacating merely puts the discharge petition back for a rehearing and is different from the revocation of the discharge.

And, of course the court will not vacate the discharge for irregularity unless it can be shown also that there are legal reasons and grounds which if sustained will result in a refusal of a discharge on the rehearing.²³

DIVISION 3.

PRACTICE.

§ 2819. Trial on Application for Revocation.—Trial must be had upon the application for revocation of the discharge.²⁴

§ 2820. Before Judge, Not before Referee.—The trial must be had before the judge, not before the referee or special master.²⁵

§ 2821. But May Be Referred to Special Master.—The matter of the revocation may be referred to the referee as special master.²⁶

§ 2821½. Petition Must Be in "Bankruptcy Court."—The application must be brought in the district court as a court of bankruptcy, and an application will be dismissed which is brought in the district court, not as a court of bankruptcy, but under its general equity jurisdiction. The bankruptcy court has exclusive jurisdiction.²⁷

§ 2822. Petition to Set Forth Facts Showing Grounds for Revocation but Need Not Allege Discharge "Not Warranted."—The petition for revocation need not allege the discharge was not warranted; such allegation would be merely a legal conclusion. It is sufficient for it to set forth the facts.²⁸ But it must nevertheless appear therefrom that the discharge was not warranted.²⁹ Merely to state that the party "is a creditor" is insufficient. It must appear that he was a creditor at the time of the bankruptcy, and not the assignee of a discharged debt nor a subsequent creditor.³⁰

§ 2823. Amendment.—The petition for revocation may be amended.³¹ But it has been held that such amendment will not be permitted after

^{22.} In re Rauchenplat, 9 A. B. R. 763, 1 P. R. 471 (D. C. Porto Rico).

^{23.} In re Downing, 28 A. B. R. 788, 199 Fed. 329 (D. C. N. Y.). Compare § 2816.

^{24.} Bankr. Act, § 15.

^{25.} Bankr. Act, § 15; Bankr. Act, § 38 (a) (4).

^{26.} In re Meyers, 3 A. B. R. 722, 100 Fed. 775 (D. C. N. Y.).

^{27.} Atlantic Dynamite Co. v. Reger, 29 A. B. R. 659, 200 Fed. 1002 (D. C. W. Va.).

^{28.} In re Toothaker Bros., 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.).

^{29.} In re Oliver, 13 A. B. R. 582, 133 Fed. 832 (D. C. N. J.); In re Downing, 28 A. B. R. 778, 199 Fed. 329 (D. C. N. Y.); In re Griffin Bros., 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.).

^{30.} In re Chandler, 14 A. B. R. 512, 138 Fed. 637 (C. C. A. Ills.).

^{31.} In re Oliver, 13 A. B. R. 582, 133 Fed. 832 (D. C. N. J.).

the expiration of the prescribed year, where it is sought thereby to set up additional grounds newly discovered.³²

§ 2824. Revocation to Be Applied for within Year after Discharge Granted.—The application must be made within the year after the granting of the discharge.³³

Obiter, *In re Shaffer*, 4 A. B. R. 730, 104 Fed. 982 (D. C. N. Car.): "Where the petition is not filed within one year, it is absolutely barred by the statute."

§ 2824½. Whether Appeal Lies.—Questions arising as to revocation of discharge are proceedings in bankruptcy and not "controversies arising in bankruptcy proceedings," within the meaning of §§ 23, 24, 25.³⁴

But it has not been authoritatively determined whether they are appealable or not.³⁵

32. *In re Wright*, 24 A. B. R. 437, 177 Fed. 578 (D. C. N. Y.); [1867] *In re Sims*, 9 Fed. 440 (D. C.); [1867] *Mall v. Ullrich*, 37 Fed. 653 (D. C.).

33. *In re Meyers*, 3 A. B. R. 722, 100 Fed. 775 (D. C. N. Y.); obiter, *In re Oleson*, 7 A. B. R. 22, 110 Fed. 796 (D. C. Iowa); *In re Cuthbertson*, 29 A.

B. R. 823, 202 Fed. 266 (D. C. S. D.).

34. *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.); also, compare, post, § 2865½.

35. *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.). Also, compare, post, § 2897½.

PART XI.

APPEALS, REVIEW AND ERROR:

CHAPTER LV.

PARTIES ON APPEAL, REVIEW AND ERROR.

Synopsis of Chapter.

- § 2825. Proper Parties on Appeal, Review and Error in General.
- § 2826. Must Have Substantial Interest in Controversy.
- § 2827. Must Be in Trustee's Name, if in Behalf of Estate and after Election of Trustee.
- § 2828. Except When Controversy About Trustee's Own Compensation or Expenses or Report on Exemptions.
- § 2829. Or, When About Own Conduct, or Administration.
- § 2830. Trustee Refusing May Be Ordered, or Creditor Be Authorized to Use Trustee's Name.
- § 2831. Court May Require Creditor to Indemnify Trustee.
- § 2832. Laches May Bar Right to Object to Other than Trustee Appealing.
- § 2833. Before Election of Trustee Appeal, Review or Error May Be by Creditor.
- § 2834. Appeal by One Party Does Not Necessarily Bring Up Case as to All.
- § 2835. Appeal Not Dismissed for Lack of Necessary Parties Where Not Parties below but Represented by Trustee.
- § 2836. Joint Appeal.
- § 2836½. Intervening Creditors on Appeal.
- § 2837. Omitted Parties Made Parties on Appeal.
- § 2838. Creditors Assenting to Composition, Necessary Parties on Appeal from Confirmation.

§ 2825. **Proper Parties on Appeal, Review and Error in General.**—The rules as to who are and who are not proper parties on appeal, review and error proceedings in bankruptcy follow in general the usual rules of federal procedure.

§ 2826. **Must Have Substantial Interest in Controversy.**—Parties on appeal, review and error must have a substantial interest in the controversy;¹ and where the appellant loses such interest pending the appeal, as by payment or otherwise, the petition will be dismissed.² But a creditor's claim need not necessarily have been allowed.³

§ 2827. **Must Be in Trustee's Name, if in Behalf of Estate and after Election of Trustee.**—All action and defense, as well on appeal, on review and in error proceedings as elsewhere, in behalf of the estate, after the election of the trustee, must be taken in the name of the trustee.⁴

1. In re Baker, 4 A. B. R. 778, 104 Fed. 287 (C. C. A. Mass.).

2. In re Baker, 4 A. B. R. 778, 104 Fed. 287 (C. C. A. Mass.).

3. Allgair v. Fisher, 16 A. B. R. 278, 143 Fed. 962 (C. C. A. N. J.).

4. Foreman v. Burleigh, 6 A. B. R. 230, 109 Fed. 313 (C. C. A. Mass.).

Dissenting opinion of Sanburn, J., in Ayres v. Cone, 14 A. B. R. 747, 138 Fed. 783 (C. C. A. S. Dak.); [1867] In re Troy Woolen Co., Fed Cases No. 14,202; [1867] In re Joseph, Fed. Cases No. 7,532; [1867] In re Place, Fed Cases No. 11,200; [1867] In re Randall, 20 Fed. Cases 226, 228, 1

Chatfield v. O'Dwyer, 4 A. B. R. 313, 101 Fed. 797 (C. C. A. Ark.): "The obvious purpose of these provisions of the act is to enable the trustee of a bankrupt's estate to take the proper and necessary steps to object to the allowance of a false or fictitious claim, and to take the proper steps to vacate the allowance of any such claims when they have been allowed, and the fact of their invalidity comes to his knowledge. The office of a trustee under the present Bankrupt Act is entirely analogous to that of assignee under the bankrupt law of 1867. The trustee is elected by, and is the representative of, the creditor; and, following the general analogies of the law, he is the appropriate person to see that no unjust or fictitious claims are allowed to be paid out of the assets in his hands. His duties are very similar to those of an administrator or executor. It is his duty to ascertain that all claims presented for allowance, or that may have been allowed, are genuine; and under subdivision 6, rule 21, of the rules in bankruptcy formulated by the Supreme Court of the United States, the trustee has been empowered to file a petition with the referee to have any claim further investigated, when for any reason he may desire a re-examination of the same. Furthermore, if one creditor of a bankrupt may prosecute an appeal, under § 25 of the bankrupt law, from the allowance of a claim, then any other creditor may take a like appeal upon the same or different grounds, and this court may be required to entertain a number of appeals, all of which are brought to test the validity of the same demand."

Compare, obiter, *Gray v. Mercantile Co.*, 14 A. B. R. 780, 138 Fed. 344 (C. C. A. N. Dak.): "But one may be before a court so as to enable it to adjudicate his rights, and yet not be an actual party to the proceeding; as when he is represented by a receiver or trustee who is an actual party, and whose duty it is to protect his interests. * * * By the decree challenged by this appeal it was adjudged that the claims of Murphy, McNamara, Blair and Lynch represent legitimate expenses and costs of administration; that the claim of Carroll, while not of this character, is yet a lawful one, and entitled to priority; and that each of these claims is properly payable out of the bankrupt's estate. The question whether the decree shall stand or be reversed is obviously of direct interest to the claimants whose claims are sustained by it, and because of this interest the question cannot be determined without affording these claimants an opportunity to be heard in defense of the decree. * * * The only parties respondent to this appeal are two general creditors. The citation is directed to them only. The reason for their presence lies in the fact that it was upon their objections that the claims of Porter and the trustee were partially disallowed. Murphy, McNamara, Blair, Lynch and Carroll are not before this court as actual parties, and are not represented by any one who is an actual party. The trustee is not their representative. He is seeking to strike down the allowance of their claims, and in this is the representative of the general creditors of the estate. *Chatfield v. O'Dwyer*, supra. Of course he cannot represent or speak for both sides to the controversy."

Sawyer, 56; *In re Lewensohn*, 9 A. B. R. 368, 121 Fed. 538 (C. C. A., referred to *In re Koenig & Von Hoogenhuyze*, 11 A. B. R. 619, 127 Fed. 801); *In re Levy*, 7 A. B. R. 56 (Ref. N. Y.).

Compare, to same effect, *Viquesnay v. Allen*, 2 A. B. R. 402, 131 Fed. 21 (C. C. A. W. Va.); compare, to effect that trustee represents all creditors on appeal, *In re Utt*, 5 A. B. R. 383, 105 Fed. 754 (C. C. A. Ills.).

Contra, and that any person aggrieved may appeal, and that one creditor may appeal from allowance of another creditor's claim, obiter, *In re Roche*, 4 A. B. R. 369, 101 Fed. 958 (C. C. A. Tex., distinguished in *Foreman v. Burleigh*, 6 A. B. R. 230, 109 Fed. 313, C. C. A. Mass.). Contra, *McDaniel v. Stroud*, 5 A. B. R. 685, 116 Fed. 486 (C. C. A. S. C.).

At any rate, such is the better practice.

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "This appeal is by a creditor who was, upon application, allowed to appeal, the trustee refusing to appeal though requested to do so. This practice seems admissible in the sound discretion of the district judge when the trustee refuses to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors."

§ 2828. Except When Controversy About Trustee's Own Compensation or Expenses or Report on Exemptions.—All such action must be taken by the trustee or in his name, except, of course, when the matter in controversy is the trustee's own compensation or expenses, or his report of exempted property. But even in such cases it has apparently been held, obiter, that he must be taken as still representing general creditors;⁵ although it is difficult to see how the trustee still "represents" general creditors when he appeals from an order cutting down his expenses. It would seem the fiction should give way to the reality that he then represents himself, in opposition to creditors. It is precisely for the reason that he did not, in the matter of allowances of compensation and expenses to himself, represent creditors, that creditors should be given notice of the filing of his final account, as prescribed by the act.

§ 2829. Or When About Own Conduct, or Administration.—Or, also, when his own conduct, or administration of the estate, is in controversy; as, for instance, where his sale is being criticised.⁶

§ 2830. Trustee Refusing May Be Ordered, or Creditor Be Authorized to Use Trustee's Name.—Where the trustee refuses to act, he may be ordered so to do; or a creditor, or other interested party, may, on application, be authorized by the court to act for the estate in the trustee's name.⁷

§ 2831. Court May Require Creditor to Indemnify Trustee.—And the court, in such instance, may require the creditor to indemnify the

5. *Gray v. Mercantile Co.*, 14 A. B. R. 780, 138 Fed. 344 (C. C. A. N. Dak.).

6. *Allegair v. Fisher*, 16 A. B. R. 278, 143 Fed. 962 (C. C. A. N. J.).

7. *Chatfield v. O'Dwyer*, 4 A. B. R. 313, 101 Fed. 797 (C. C. A. Ark.), in which case the court bases its holding on the duty of the bankrupt to inform the "trustee" of improper claims; also upon the theory that he is the representative of all creditors, that all creditors are interested parties and must be parties on appeal; and finally, that otherwise, there might be as many appeals as there were creditors to institute them.

Obiter, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted at § 2827; obiter, *In re National Press Brick Co.*, 32 A. B. R. 224, 212 Fed. 878 (C. C. A. Mich.).

See analogously, *Smith v. Belden*, 6 A. B. R. 432, 35 Misc. N. Y. 113.

Compare, *In re Levy*, 7 A. B. R. 56 (Ref. N. Y.), where the court held a creditor could appeal in his own name, where the trustee has refused for insufficient reasons and has delayed until time for appeal has almost expired.

[1867] *In re Randall*, 1 Sawyer 56, 20 Fed. Cases 226, 228.

trustee against costs; or to pay the costs, if unsuccessful.⁸

§ 2832. Laches May Bar Right to Object to Other than Trustee Appealing.—Laches in objecting to other parties than the trustee taking such action, may be a waiver of the objection. Thus, the objection may not be raised for the first time on review.⁹

§ 2833. Before Election of Trustee Appeal, Review or Error May Be by Creditor.—Manifestly, before a trustee is elected some one must have the right to prosecute appeal and petitions for review; and where the order complained of was entered on an application made before the election of trustee, the original applicant is a competent party.¹⁰

§ 2834. Appeal by One Party Does Not Necessarily Bring Up Case as to All.—Appeal by one party does not necessarily bring up the case as to all parties.

Thus, an appeal by a creditor, where there is no cross appeal by the bankrupt, from an order overruling part and sustaining part of the creditor's exceptions to the trustee's report of exempted property, does not bring up the bankrupt's case and the bankrupt may not move to dismiss the creditor's appeal upon the ground that the court was without jurisdiction.¹¹

Similarly, on a creditor's petition for review of an order distributing property claimed as exempt between certain classes of creditors to the exclusion of the class to which the complainant belongs, the bankrupt will not be heard, where he has filed no petition for review, in review of the order refusing him the exemptions altogether.¹²

§ 2835. Appeal Not Dismissed for Lack of Necessary Parties Where Not Parties Below but Represented by Trustee.—Appeal will not be dismissed for lack of necessary parties where the parties alleged to be necessary were not parties below; and, where they were represented solely by the trustee below, they must be deemed sufficiently represented by him in the appellate court.¹³

8. *Chatfield v. O'Dwyer*, 4 A. B. R. 313, 101 Fed. 797 (C. C. A. Ark.); *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted at § 2827.

9. *In re Koenig & Van Hoogenhuyze*, 11 A. B. R. 619, 127 Fed. 891 (D. C. Tex.).

10. *Clark v. Pidcock*, 12 A. B. R. 309, 129 Fed. 745 (C. C. A. N. J.): In this case the assignee of a creditor had applied for the reopening of an estate as not having been fully administered. At the same time he procured a restraining order. On the hearing of the restraining order it was dis-

solved but a trustee was appointed. The court held the creditor's assignee was a competent party on review.

11. *McGahan v. Anderson*, 7 A. B. R. 641, 113 Fed. 115 (C. C. A. S. C.).

12. *In re Cohn*, 22 A. B. R. 761, 171 Fed. 568 (D. C. Dak.). See, also, ante, § 1111½.

13. *In re Utt*, 5 A. B. R. 383, 105 Fed. 754 (C. C. A. Ills.). Compare, to same effect, *Love v. Export Storage Co.*, 16 A. B. R. 171, 143 Fed. 1 (C. C. A. Tenn.). But compare, *Ayres v. Cone*, 14 A. B. R. 745, 138 Fed. 778 (C. C. A. S. Dak.).

§ 2836. Joint Appeal.—All parties aggrieved by a final decision, whereby a bill in equity or a petition in bankruptcy is dismissed, may join in an appeal, although some complain of one alleged error and some of another; because, on such an appeal, all prior rulings are reviewable.¹⁴

Where, upon the determination of a question affecting the distinct interests of several claimants, the court enters a single judgment and allows a joint appeal, a motion to dismiss, upon the ground that the interests of the petitioner are not joint, will be denied.¹⁵

The established rule of the federal appellate courts, indeed, requires all parties against whom a judgment or decree is rendered, in the absence of severance, to join in suing out a writ of error or prosecuting an appeal therefrom.

In *re Dandridge & Pugh*, 31 A. B. R. 16, 209 Fed. 838 (C. C. A. Ills.): "The general rule that parties against whom a joint judgment or order is rendered must unite in an appeal, is applicable to appeals in bankruptcy proceedings."

But this rule requiring joinder only applies to a joint judgment or decree against such parties; it has no application to separate judgments or decrees against such parties, though rendered at the same time and contained in the same entry.

Trustees in bankruptcy, who, as individuals, are, by agreement of the contending parties, mere stakeholders of a fund in controversy, are not necessary parties as individuals to an appeal from such part of a decree as determines that one of the parties is entitled to the fund; nor need they be made respondents.¹⁷

§ 2836½. Intervening Creditors on Appeal.—Failure to join intervening creditors, or by appropriate proceedings to sever them from the appeal is fatal to the jurisdiction of the appellate court.¹⁸

§ 2837. Omitted Parties Made Parties on Appeal.—Omitted parties may, under certain circumstances, be made parties on appeal;¹⁹ likewise, on review.²⁰ But laches will bar the right.²¹

§ 2838. Creditors Assenting to Composition, Necessary Parties on Appeal from Confirmation.—On appeal from an order confirming a composition, creditors who have assented thereto and have received their money are necessary parties.²²

14. *Stevens v. Nave-McCord Co.*, 17 A. B. R. 609, 150 Fed. 71 (C. C. A. Colo.).

15. *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.).

17. *Love v. Export Storage Co.*, 16 A. B. R. 171, 143 Fed. 1 (C. C. A. Tenn.).

18. In *re Dandridge & Pugh*, 31 A. B. R. 16, 209 Fed. 838 (C. C. A. Ills.).

19. Impliedly, *Gray v. Mercantile*

Co., 14 A. B. R. 780, 138 Fed. 344 (C. C. A. N. Dak.).

20. *Allgair v. Fisher*, 16 A. B. R. 278, 143 Fed. 962 (C. C. A. N. J.).

21. *Gray v. Mercantile Co.*, 14 A. B. R. 780, 138 Fed. 344 (C. C. A. N. Dak.).

22. *Marshall Field & Co. v. Wolf Bros. Dry Goods Co.*, 9 A. B. R. 693, 120 Fed. 815 (C. C. A. Ark.).

CHAPTER LVI.

REVIEW OF THE REFEREE'S ORDER BY THE JUDGE.

Synopsis of Chapter.

§ 2839. Review of Referee's Orders—Jurisdiction.

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§ 2861. Referee's Order and Finding Presumed Correct, until Manifest Error Shown.

§ 2861½. Decision Below on One Ground, Nevertheless Other Grounds Available to Respondent on Review.

§ 2862. Points Not Discussed below, whether Considered on Review.

§ 2863. Remanding for Further Testimony Where Referee's Order Disallowing Claim at Close of Claimant's Evidence in Chief Reversed.

§ 2839. Review of Referee's Orders—Jurisdiction.—To correct the errors of referees in bankruptcy, power is vested in courts of bankruptcy, by clause 10 of § 2 of the act to "consider and confirm, modify or overrule, or return with instructions for further proceedings records and findings certified to them by referees." ¹

¹ Bankr. Act, § 38. In re Home Discount Co., 17 A. B. R. 175, 147 Fed. 538 (D. C. Ala.); instance, In re Crib-
lier, 25 A. B. R. 765, 184 Fed. 338 (D. C. Conn.).

Brown v. Pegram, 10 A. B. R. 422, 125 Fed. 577 (C. C. A. Pa.): "The jurisdiction with which a referee is invested is made expressly subject to review by the judge of a court of bankruptcy."

Ellis v. Krulewitch, 15 A. B. R. 617, 141 Fed. 954 (C. C. A.): "By § 38 * * * every act of a referee in bankruptcy is subject to review by the judge."

The supreme court, in carrying out the purpose of this section, has laid down General Order No. XXVII regulating the manner of procedure to obtain a review by the judge. It reads as follows:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

And the orders or findings of the referee are reviewable only on petition for review filed as so provided by General Order No. 27.²

And review may not be had unless the prescribed method is carried out.³

Where the parties submit themselves to the jurisdiction, however, the interests of justice may warrant the court in overlooking a failure to comply with the letter of the rule.⁴

A party may not ignore the order of the referee; and then, on proceedings in contempt, bring forward in defense matters litigated before the referee.⁵

In *re Home Discount Co.*, 17 A. B. R. 175, 147 Fed. 538 (D. C. Ala.): "He cannot ignore the order until the referee under § 41 certifies his disobedience to the judge, and then bring forward again in his defense, matter contested before the referee prior to the making of the order, provided the order itself be not void. 'The method of correcting error is by appeal, and not by disobedience.'"

2. In *re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658, 176 Fed. 955 (D. C. Pa.).

3. In *re Home Discount Co.*, 17 A. B. R. 175, 147 Fed. 538 (D. C. Ala.); In *re Greek Mfg. Co.*, 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.).

Formalities.—"This court (Mass.) requires no particular formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee." In *re Swift*, 9 A. B. R. 237, 114 Fed. 947 (D. C. Mass.): If the matter in dispute is substantially set forth, that is enough. *Ibid.*

General Subject of Review of Referee's Orders.—Upon the general subject of reviews of referee's rulings, see In *re DeGottardi*, 7 A. B. R. 723, 114 Fed. 328 (D. C. Calif.).

In *re Taft*, 13 A. B. R. 417, 133 Fed. 511 (C. C. A. Ohio); In *re Russell*, 5 A. B. R. 566, 105 Fed. 501 (D. C. Ca-

lif.); In *re Smith*, 2 A. B. R. 190, 93 Fed. 791 (D. C. Tex.); In *re Schiller*, 2 A. B. R. 704, 96 Fed. 400 (D. C. Va.); In *re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.); *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.).

Conduct of Proceedings and Record to Give Opportunity for Fair Review.

—The referee should so conduct his proceedings and make up his records that a full and fair review of his acts may be had. In *re Romine*, 14 A. B. R. 785, 138 Fed. 437 (D. C. W. Va.).

Litigants should be notified of referee's decision in order to be given opportunity for review, In *re Nichols*, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.). In *re Octave Mining Co.*, 32 A. B. R. 474, 212 Fed. 457 (D. C. Ariz.).

4. In *re Carlile*, 29 A. B. R. 373, 199 Fed. 612 (D. C. N. Car.).

5. Compare with § 1857.

DIVISION 1.

PROCEDURE TO REVIEW REFEREE'S RULINGS.

§ 2840. Order Must Be Made.—An order must be made.⁶

In re Chambers, Calder & Co., 6 A. B. R. 709, 98 Fed. 865 (Ref. R. I.): "A petition * * * does not comply * * * where it asks for a review of the decision of the referee, instead of a review of the order of the referee."

In re Reukauff, 14 A. B. R. 344, 135 Fed. 251 (D. C. Pa.): "Certainly in the ordinary proceeding the referee must make some order or ruling before there is anything to certify."

In re Smith, 2 A. B. R. 190, 93 Fed. 791 (D. C. Tex.): "If the referee predicted his certificate upon Rule XXVII of the Supreme Court, it does not appear that in the proceeding before him any order was made upon his finding; nor does the record contain a petition filed by the bankrupt, setting out any error committed by the referee."

Compare, In re Kelly Dry Goods Co., 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.): "Rule 27 of the General Orders in Bankruptcy * * * provides for 'review by the judge of any order made by the referee;' but I do not understand that a general review of the proceedings before the referee, or review of the rulings not directly affecting an order made, is intended either by the act or rules."

And requests for the review of the "decision,"⁷ or "opinion,"⁸ of the court are insufficient.⁹

There can be no review of a question certified in advance, no review of a hypothetical question actually or likely to arise but not already arisen.¹⁰

In re Reukauff Sons & Co., 14 A. B. R. 344, 135 Fed. 251 (D. C. Pa.): "The referee made no order, either directing or refusing to direct the trustee to pay over the money to the landlord, but of his own motion certified the question, whether the taxes had priority to the landlord's claim. There was no petition for review, and indeed there was nothing to which such a petition could apply. In effect, the referee is asking the court's opinion on a question which he foresees may arise, upon which he desires to be advised. I find nothing in the Bankrupt Act or in the general orders or forms, to sanction such a proceeding. * * *

"Both § 39 and the order thus quoted contemplate that there shall be a contested matter, a finding or an order, and a party aggrieved, and I see no indication anywhere that the judge may be required to answer questions before the referee himself takes action."

Perhaps, however, exceptional cases might arise warranting the referee in presenting a question to the judge for decision without an order.¹¹

6. Gen. Order No. 27. Craddock-Terry Co. v. Kaufman, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.).

7. In re Chambers, Calder & Co., 6 A. B. R. 709, 98 Fed. 865 (Ref. R. I.).

8. Analogously (review of judge's "opinion"), In re Boston Dry Goods Co., 11 A. B. R. 79, 125 Fed. 226 (C. C. A. Mass.). In re Schneider, 29 A. B. R. 469, 203 Fed. 589 (D. C. Pa.).

9. See post, § 2849.

10. Craddock-Terry Co. v. Kaufman, 23 A. B. R. 704, 175 Fed. 303 (D. C. Tex.).

11. Apparently to such effect, obiter, In re Reukauff, 14 A. B. R. 344, 135 Fed. 251 (D. C. Pa.); apparently, obiter, In re Kelly Dry Goods Co., 4 A. B. R. 258, 102 Fed. 747 (D. C. Wis.).

§ 2841. Order Must Be Final Not Interlocutory: Case Not to Be Reviewed Piecemeal.—The order should be a final order, not an interlocutory order; and the case may not be brought up for review piecemeal.

Impliedly, *In re Mullen*, 4 A. B. R. 224, 101 Fed. 413 (D. C. Mass.): "I am also inclined to think it would have been more regular had the review * * * been made to await a decision of the referee upon the facts involved. It is not usually convenient for this court, by way of review, to deal twice with the same petition * * * once upon the law and again upon the facts."

The rulings of the referee made from time to time during the progress of a particular hearing may not be reviewed separately, whilst the hearing is still pending. There must be a final order ending the controversy, and then all errors can be reviewed at one time.¹²

Nor may there be a general review of the entire proceedings.¹³

A mere "order to show cause" is in the nature of process, being a method prescribed for bringing a respondent into court; it is interlocutory and not in and of itself appealable nor reviewable.¹⁴

The order of a referee refusing to dismiss a petition seeking the surrender of assets alleged to be in the possession of the bankrupt is not final.

In re Schimmel, 29 A. B. R. 361, 203 Fed. 181 (D. C. Pa.): "Upon petition of the trustee the court granted a rule upon the bankrupt to show cause why the petition for review should not be dismissed, the certificate stricken off and the bankrupt directed to proceed with his defence to the trustee's petition. The question presented, therefore, is whether the order of the referee refusing the bankrupt's motion to dismiss the petition for want of proof is, under the circumstances of this case, such an order as should be certified for review. The referee in refusing the motion in effect sustained the evidence as prima facie sufficient to support an order upon the bankrupt to pay. Upon a review of the present order, the effect of the bankrupt's reservation of his right to produce testimony would be to give him his day in court before the referee and then, if the decision should be adverse to him and the referee's order should be confirmed, to give him the benefit of another day in court before the referee to make his defence. No precedent has been cited by counsel upholding such a rule of practice. Upon refusal of the motion to dismiss, the bankrupt should either proceed with his case or rest it upon the testimony produced by the trustee. If he chose the latter course, the referee would make an order upon the bankrupt to pay or dismiss the petition for want of proof."

§ 2842. Exception to Be Taken to Order.—Exception must be taken to the order of the referee complained of.¹⁵

§ 2843. Also to Findings of Fact, Else Conclusive on Review.—If no exceptions are filed to the referee's findings of fact, the findings of

^{12.} Compare, inferentially, *In re Hawley*, 8 A. B. R. 632, 116 Fed. 428 (D. C. Iowa); *Blease v. Garlington*, 92 U. S. 1.

^{13.} *In re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.).

^{14.} *Morehouse v. Hardware Co.*, 24

A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

^{15.} Impliedly, *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. Car.); inferentially, *In re O'Connor*, 9 A. B. R. 18 (D. C. Ga.).

fact are conclusive on review,¹⁶ even if the ruling or order made thereon is duly excepted to.

§ 2844. Exceptions Must Be Specific, Not "Broadside."—The exceptions must be specific and not broadside.¹⁷ It is the duty of the party complaining to point out clearly the error complained of.¹⁸

§ 2845. But No Formal "Exceptions" Need Be "Filed."—No formal exceptions to the rulings or findings of the referee need be filed.¹⁹

In *re Swift*, 9 A. B. R. 237, 118 Fed. 348 (D. C. Mass.): "It is sufficient to say that this court has not hitherto required, and does not intend to require hereafter, any particular formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee. If the matter in dispute is substantially set out, that is enough. No formal exceptions to the referee's findings or rulings need be filed. If this practice shall seem lax to some, the answer is that it has hitherto been found convenient in this district, both for the judge and for the parties, and it has not been abused. A stricter practice has been adopted in some other districts, doubtless because it has been deemed convenient there."

Special master's hearing on discharge: In *re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va., affirmed on review sub nom. *Bk. v. Johnson*, 16 A. B. R. 210 (C. C. A. W. Va.): "When is a referee required to certify objections made to his rulings to the court for revision? Must he do so every time a question is asked which he rules is objectionable, or every time he may express an opinion during its taking, touching the evidence? Certainly not. The very reason for the establishment of the first proposition—that he is to take down testimony which he believes and rules improper—is for the very purpose of preventing constant and vexatious certificates for revision. In any matter wherein he is by the law empowered to enter orders that under the law may become final when he has entered such an order, a revision may be had—a revision of his judicial act, which, unrevoked, binds parties and becomes the law of the case."

Bank v. Johnson, 16 A. B. R. 210 (C. C. A. W. Va., affirming *In re Romine*, 14 A. B. R. 785, 138 Fed. 437, D. C. W. Va.); "The referee therefore was right in refusing to stop the proceedings and certify for revision his rulings upon this testimony."

In *re Miner*, 9 A. B. R. 100, 117 Fed. 953 (D. C. Ore.): "Where the specific questions as to the correctness of the referee's finding is certified for review no exception is necessary."

In *re People's Department Store*, 20 A. B. R. 244, 159 Fed. 286 (D. C. N. Y.): "Counsel for the trustee contend that, as no formal exceptions were filed to the decision and ruling of the referee, his findings of fact should not be disturbed. In the absence of a rule or order of this court requiring exceptions to be filed, such filing was not essential. The petition for review sufficiently indicates the single disputed question which is assigned for error."

16. In *re Carver & Co.*, 7 A. B. R. 539, 113 Fed. 138 (D. C. N. C.).

Analogously, In *re Royal*, 7 A. B. R. 636 (D. C. N. Car.): This, however, was a case where the referee sat as special master on a discharge hearing.

17. *Dressel v. North State Lumber*

Co., 9 A. B. R. 541, 119 Fed. 531 (D. C. N. Car.).

18. In *re Harnden*, 29 A. B. R. 507, 200 Fed. 172 (D. C. N. Mex.).

19. Thus, none to referee's allowance of attorney's fees. In *re Lane Lumber Co.*, 30 A. B. R. 749, 206 Fed. 780 (D. C. Idaho).

But compare, *In re Carver & Co.*, 7 A. B. R. 539, 113 Fed. 128 (D. C. N. C.): "Where no exceptions are filed to the report of the referee, his findings of fact are conclusive on review."

However, the rule dispensing with the filing of formal exceptions does not dispense with the necessity of at least noting some exception to the order, in the record.

§ 2846. Petition for Review Must Be Filed.—Second, the exceptor must file with the referee a petition for review.²⁰

In re Hawley, 8 A. B. R. 632, 116 Fed. 428 (D. C. Iowa): "It does not appear that the creditors asked for or obtained a certification of any question connected with this claim by the referee, nor did the creditors petition for a review of the ruling of the referee under the provisions of General Order 27 (89 Fed. xi). The only action taken by the creditors contesting the claim was to file in this court on June 6th, 1902, certain exceptions to the rulings of the referee. Such action, however, does not bring before the court for review the rulings and decisions of the referee."

In re Russell, 5 A. B. R. 566, 105 Fed. 501 (D. C. Calif.): "It does not appear from the certificate of the referee or from any paper returned to this court that any petition for the review of the order of the referee rejecting his claim has been filed by him with the referee. In the absence of such a petition, this court is not authorized to review the action of the referee."

In re Greek Mfg. Co., 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.): "This method of reviewing an order (Gen. Ord. No. 27) is exclusive."

§ 2847. Petition Must Set Forth Errors Complained of.—There seems to be no official form for a petition for review; and a brief statement of the order entered and the errors complained of is all that is necessary. The petition must set forth the errors complained of.²¹

In re Taft, 13 A. B. R. 419, 133 Fed. 511 (C. C. A. Ohio): "It is therefore an elementary rule of procedure that the petition for review shall set out the matters of law which we are asked to review."

§ 2848. But New Facts May Not Be Set Up, Changing Case.—But new facts may not be set up, changing the case on review, unless perhaps on leave granted and showing made of newly-discovered evidence which could not by reasonable diligence have been produced at the trial;

²⁰ Gen. Ord. No. 27; *In re Smith*, 2 A. B. R. 190, 93 Fed. 791 (D. C. Tex.); *In re Carlile*, 29 A. B. R. 373, 199 Fed. 612 (D. C. N. Car.).

In re Schiller, 2 A. B. R. 704, 96 Fed. 400 (D. C. Va.): Although in this case the court actually did consider the error complained of without a petition.

Not to Be Conditioned on Payment of Costs.—The right to carry up the case for review of the referee's order may not be conditioned on the pay-

ment of costs, obiter, *West v. McLaughlin Co.*, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.).

Defective certificate of referee not to be treated as petition for review. *Craddock-Terry Co. v. Kaufman*, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.).

²¹ *In re Chambers, Calder & Co.*, 6 A. B. R. 709 (Ref. R. I.); *In re Smith*, 2 A. B. R. 190 (D. C. Tex.); *In re Schiller*, 2 A. B. R. 704, 96 Fed. 400 (D. C. Va.). Compare, post, § 2948.

which, in effect, would not be a petition for review, but rather a motion for a rehearing before the referee.²²

In *re McIntyre*, 16 A. B. R. 85, 142 Fed. 593 (D. C. W. Va.): "But after he had entered his final order adjudicating the matter this way, Fouse, by petition, asks a review, and for the first time charges substantially that the lessors by their agent, before his purchase of the property, represented to him that Depue had adjusted the rent and upon this representation he was induced to buy. This, if substantiated, would make an altogether different case out of the matter. * * * The petition here must be held to have been one in the nature of a bill of review. Such bills can be filed for errors in law apparent upon the face of the decree, or because of the discovery of new evidence since hearing, which could not have been discovered by the use of due diligence before such hearing. In case newly discovered evidence is set up, such a bill can only be filed by express leave of the court, and great caution is to be exercised in granting such leave. The evidence must be relevant, material, and such as would have produced a different result had it been used at the hearing."

§ 2849. And Should Pray for Review of Referee's Order.—The petition should pray for review of the "order" of the referee, not of his "decision;"²³ nor of his "opinion."²⁴

§ 2850. Petition to Be Filed with Referee.—This petition must be filed with the referee.²⁵ But, of course, if by mistake the petition has been filed with the clerk, the court may permit the correction of such mistake.²⁶

§ 2851. Time Limited for Filing Petition for Review.—Neither the statute, forms nor General Orders in Bankruptcy provide the time within which the party aggrieved by the referee's rulings must file his petition for review.²⁷

22. Judge Considering Evidence Outside Record on Review.—In one case it appears the judge considered documents and testimony outside of the record on review, and sustained the referee's conclusions, but perhaps he so considered them at the request of the petitioner on review. In *re* (Stokes, 26 A. B. R. 256, 185 Fed. 994 (D. C. Ga.). And it has been maintained in other cases that the facts shown on the record may be supplemented by other facts under certain circumstances. *Ex parte Cuddy*, 131 U. S. 280; *Ex parte O'Neal*, 11 A. B. R. 196, 125 Fed. 967 (C. C. A. Fla.).

23. In *re Chambers, Calder & Co.*, 6 A. B. R. 709, 98 Fed. 865 (Ref. R. I.).

24. Analogously (review of judge's "opinion" asked), In *re Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 226 (C. C. A. Mass.). But compare inadvertent remark, In *re Taft*, 13 A. B. R. 419, 133 Fed. 511 (C. C. A. Ohio). See ante, § 2840.

25. In *re Russell*, 5 A. B. R. 566, 105 Fed. 501 (D. C. Calif.); impliedly, In

re Greek Mfg. Co., 20 A. B. R. 111, 164 Fed. 211 (D. C. Pa.).

Whether Referee May Vacate or Modify Order.—Doubtless the referee has jurisdiction to grant a rehearing or to vacate or modify his own order. But compare, In *re Greek Mfg. Co.*, 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.).

Referee May Not Review Own Orders on Exceptions Thereto.—In *re Marks*, 22 A. B. R. 568, 171 Fed. 281 (D. C. Pa.).

26. In *re Nippon Trading Co.*, 25 A. B. R. 695, 182 Fed. 959 (D. C. Wash.).

27. *Bacon v. Roberts*, 17 A. B. R. 424, 146 Fed. 729 (C. C. A. N. J.); In *re Grant*, 16 A. B. R. 246, 143 Fed. 661 (D. C. R. I.); In *re Milgram & Ost*, 13 A. B. R. 337, 133 Fed. 802 (D. C. Pa.); In *re Chambers, Calder & Co.*, 6 A. B. R. 709, 98 Fed. 865 (Ref. R. I.); analogously, In *re Worcester Co.*, 4 A. B. R. 501, 102 Fed. 308 (C. C. A. Mass.); In *re Maloney*, 21 A. B. R. 502 (D. C. Sup. Ct.).

Crim v. Woodford, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.): "There is nothing in the Bankrupt Act nor in the General Orders which fixes a time within which petitions for review of the referee's decisions must be filed. Section 25 requires that in the cases therein enumerated appeals to the Circuit Courts of Appeal shall be taken within 10 days after the judgment appealed from has been rendered. There is no apparent reason why a longer time than this should be allowed for the filing of a petition for a review of the order of a referee, for in nearly all of the provisions of the Bankruptcy Act which require notices the time limit of 10 days is adopted, and in some jurisdictions there is a rule to that effect; but it does not appear that there is any such rule in the district from which this appeal comes. There being no time limit fixed by the statute or by rule, it seems to be left to the discretion of the judge, and the practice, so far as adjudicated cases which we have examined enlighten us on this point, is that the petition may be filed within a reasonable time."

In re Greek Mfg. Co., 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.): "It will be observed that no time is fixed within which the petition must be filed with the referee. How long the time shall be is therefore left to be regulated by the courts as they may think proper, and they have agreed that unless a rule upon this subject has been adopted a reasonable time is sufficient."

But either by local rule, or special order in each case, a time limit for filing a petition for review may be fixed.²⁸ In some districts, in analogy to the time fixed for taking an appeal to the circuit court of appeals, ten days has been fixed as the time for filing the petition for review, unless further time be granted by special leave of court.²⁹ If neither local rule nor special order has fixed the time, then the party aggrieved has a reasonable time.³⁰

And if no time is limited, yet laches will bar the right to appeal from the referee's ruling.³¹

In re Grant, 16 A. B. R. 256, 143 Fed. 661 (D. C. R. I.): "While General Order No. 27 fixes no time within which a person, desiring a review by a judge of an order made by a referee, shall file his petition, and while no rule has

28. Inferentially, *In re Scott*, 3 A. B. R. 626, 99 Fed. 404 (D. C. N. Car.); *In re Scherr*, 14 A. B. R. 794, 138 Fed. 695 (D. C. Pa.); inferentially, *Crim v. Woodford*, 14 A. B. R. 304, 136 Fed. 34 (C. C. A. W. Va.); inferentially, *Bacon v. Roberts*, 17 A. B. R. 424, 146 Fed. 729 (C. C. A. N. J.); *In re Greek Mfg. Co.*, 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.); inferentially, *In re Maloney*, 21 A. B. R. 502 (D. C. Sup. Ct.). Thus, it is fixed at 10 days in the Eastern District of Pennsylvania, *In re Marks*, 22 A. B. R. 568, 171 Fed. 281 (D. C. Pa.). Instance, District of Maryland, fifteen days, *In re Wink*, 30 A. B. R. 298, 206 Fed. 348 (D. C. Md.).

29. *In re Nippon Trading Co.*, 25 A. B. R. 695, 182 Fed. 959 (D. C. Wash.).

30. *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.); *Bacon v. Roberts*, 17 A. B. R. 421 (C. C. A. N. J.); *In re Foss*, 17 A. B. R.

439 (D. C. Me.), wherein thirty days were held unreasonable; whilst in *In re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.), thirty days were held not unreasonable; *In re Maloney*, 21 A. B. R. 502 (Sup. Ct. D. C.): Limit fixed at 20 days "by analogy."

31. *In re Chambers, Calder & Co.*, 6 A. B. R. 709, 98 Fed. 865 (Ref. R. I.); *In re Milgraum & Ost*, 13 A. B. R. 337, 133 Fed. 802 (D. C. Pa.); inferentially, *Crim v. Woodford*, 14 A. B. R. 305, 136 Fed. 34 (C. C. A. W. Va.); *In re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.), wherein 30 days were held not laches; *In re Maloney*, 21 A. B. R. 502 (Sup. Ct. D. C.), wherein 4 months apparently were held laches. *In re Verdon Cigar Co.*, 27 A. B. R. 56, 193 Fed. 813 (D. C. Mich.); *In re Octave*, 32 A. B. R. 474, 212 Fed. 457 (D. C. Ariz.).

hitherto been made by this court fixing the time, it is apparent that the right to file such a petition for review cannot be so exercised as unreasonably and unnecessarily to delay the distribution of the assets of the bankrupt."

Bacon v. Roberts, 17 A. B. R. 424 (C. C. A. N. J.): "We agree with the cases cited by counsel—there is no dispute upon this subject—that no limit of time for taking an appeal has been fixed either by the statute or by the general orders; and therefore that, if the particular district court whose action is in question has made no rule upon the subject, the application for review is addressed in the first instance to the sound discretion of the court. It is a familiar principle, that the exercise of such discretion will not be interfered with by an appellate tribunal, except for manifest error, or, as the phrase sometimes goes, for abuse of the court's discretionary power; and it is only necessary to say that we do not find in this record either abuse of discretion, or manifest error, in dismissing the trustee's petition for review."

In re Nichols, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.): "There is no rule in the Northern district of New York fixing the time within which an application to review an order of the referee shall be made. It follows that such an application should be made within a reasonable time. Parties litigant should not sleep upon their rights. Here the creditors were informed of the pendency of Wheeler's claim, and they made no objection to its allowance as one entitled to priority of payment. I cannot on the evidence before me, and on the papers in the case, reverse the finding of the referee that Bonnefond was guilty of laches. Bonnefond's attorney was guilty of laches after receiving a copy of the order from the referee. The application for a review came too late. * * * I am inclined to the opinion that petitions for review, which are in their nature appeals from the order, should be filed within the time fixed for an appeal from the same class of orders, and that this should be regarded as a reasonable time. * * * In this case Bonnefond allowed more than six months to elapse after notice of the order before he took action, and the application for review must be, and is, denied, and the proceeding for review is dismissed."

And the discretion of the district judge, in deciding upon the question of laches, will not be disturbed except for manifest error.³² A motion for extension of time to perfect appeal comes too late after the expiration of the time.³³

The time for filing a petition to review will be enlarged where the petition was, in good faith, erroneously filed with the clerk instead of the referee.³⁴

§ 2852. Certificate of Question, Summary of Evidence, Findings and Order of Referee, Requisite.—Third, a certificate of the question in controversy, together with a summary of the evidence in relation thereto, the findings of the referee thereon, and a copy of the order excepted to, must be prepared.³⁵ It may not be omitted, and no substitute will suffice.

In re Kurtz, 11 A. B. R. 129, 125 Fed. 992 (D. C. Pa.): "The referee's method of complying with the creditor's request for a certification of the question pre-

32. *Bacon v. Roberts*, 17 A. B. R. 424, 46 Fed. 729 (C. C. A. N. J.).

33. Inferentially, *In re Scott*, 3 A. B. R. 626, 96 Fed. 607 (D. C. N. Car.). See analogously, *In re Alden Electric*

Co., 10 A. B. R. 370, 123 Fed. 415 (C. C. A. Ill.).

34. *In re Nippon Trading Co.*, 25 A. B. R. 695, 182 Fed. 959 (D. C. Wash.).

35. *In re Marengo, etc., Co.*, 29 A. B. R. 46, 199 Fed. 474 (D. C. Ala.).

sented is not to be commended. He did not obey the plain command of Rule 27, which requires him, upon proper petition for a review of any order, 'forthwith (to) certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon;' but merely transmitted to the clerk the notes of testimony, his own opinion and the creditor's petition for review. There is no attempt to certify the precise question that was ruled upon, and there is no summary of the evidence relating thereto. Both these provisions are important and should be carefully observed. The certification of the question prevents disputes among counsel concerning the point presented and decided, and the summary of the evidence is required in order to save the judge the labor of examining what is often a mass of testimony on many different questions, and of extracting so much as may be relevant to the point immediately in hand. The summary may also be valuable, as showing what evidence has been considered by the referee before coming to a conclusion. In the present case, the absence of the summary is not so important as it might be to others, because all of the testimony has some bearing upon the question before the referee; but I take this occasion to call attention to the rule, with the expectation that it will be obeyed hereafter."

§ 2853. Certificate, Though Referee's, May Be Prepared by Counsel.—The law makes this certificate the act of the referee; and the certificate itself certainly is the referee's act, but the record thus certified by the referee is frequently prepared by the attorneys in the case.³⁶

§ 2854. Record on Review to Show Certificate.—The record on review must show this certificate, otherwise it will not be considered as before the court.³⁷

Landry v. San Antonio Brew. Ass'n, 20 A. B. R. 226, 159 Fed. 700: "We find in the transcript neither an agreed statement of facts, a finding of facts by the judge, nor even a summary of the evidence. Petitions to this court for superintendence and revision are restricted to questions of law. Therefore this petition is denied."

In practice, the order of statement will be found difficult to follow. It will usually be found difficult to state what the question or point was that arose, until first the evidence in relation to it is stated. Seldom can one embody all the necessary qualifications and modifying clauses requisite to state precisely the issue raised, without first stating the evidence. So in practice the brief summary of facts is usually stated first.

§ 2855. Not Entire Evidence but Only "Summary" to Be Certified.—The referee is not to certify up the whole of the evidence, but only a "summary" of it.³⁸

36. Official Form.—The official form prescribed for the certificate of facts, is known as form No. 56. See Appendix, Official Form No. 56.

37. Analogously, *In re Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 226 referred to in *In re Shea*, 11 A. B. R. 209, 126 Fed. 153 (C. C. A. Mass.); *Devries v. Shannahan*, 10 A. B. R. 518, 122 Fed. 629 (C. C. A. Md.); *In re*

Kimmel, 25 A. B. R. 595, 183 Fed. 665 (D. C. N. Y.).

38. Bankr. Act, § 39 (a) (5); Gen. Ord. 27; Official Form No. 56; *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 903 (C. C. A. Ky.).

Instance, *In re Hays*, 24 A. B. R. 691, 181 Fed. 674 (C. C. A. Ohio): "The referee made carefully prepared findings of fact and law accompanied by a summary of the evidence."

Crim v. Woodford, 14 A. B. R. 306, 136 Fed. 34 (C. C. A. W. Va.): "The General Order (27) above cited, is intended, manifestly, to carry into effect these provisions, so as to avoid as far as possible the sending of the original proofs to the judge, and to substitute therefor, where the ends of justice would permit, a summary thereof. * * * It is important that this rule be enforced, for in the manifold and onerous duties devolved upon the district judge in the administration of the bankrupt estates he ought not to be required to sift out the testimony in order to determine the exact question of fact which could be presented in a summary of the evidence."

In re Taft, 13 A. B. R. 419, 133 Fed. 511 (C. C. A. Ohio): "The referee certified the whole of the evidence instead of certifying a summary thereof, as he should have done under Gen. Ord. 27."

It might naturally be supposed that the "summary of the evidence" does not mean that the statement of the evidence must be summary, but that it may be summary and yet be sufficient. There could be no objection to a verbatim recital of all the testimony in full, if the referee's findings of fact accompanied it. Such recital would be a fairer statement of the evidence than the fairest "summary."

Crim v. Woodford, 14 A. B. R. 307, 136 Fed. 34 (C. C. A. W. Va.): "It may well be, in a question which involved the bona fides of the claims and the pecuniary condition of the bankrupt at the time the alleged liens were executed, that all of the testimony taken was pertinent to the issue, and that no summary thereof that the referee could prepare would have been acceptable to the parties to the controversy. In a case of this nature every question and answer presumably has some bearing upon the point at issue, and a skilled lawyer might find it difficult to prepare a satisfactory summary."

Also, compare the reasoning of the court in *In re Robertshaw Mfg. Co.*, 14 A. B. R. 342, 135 Fed. 220 (D. C. Pa.): "In fact, the judge of the court from which the appeal is taken ought not in the least interfere in the discretion allowed by the general terms used in the acts of Congress and rules of court in designating the record to be certified in cases of appeal as his judgment is to be reviewed, and his opinion of the importance and relevancy of matters contained in the record might, in the estimation of counsel for one side or the other, be as faulty as it is claimed his judgment is from which an appeal is taken." This reasoning, however, would equally apply to the referee's attempts to summarize the evidence.

If all the evidence were thus certified up, there would not necessarily be any confusion resulting, for the referee would then also certify his findings of the facts proved thereby.

Nevertheless, the contrary is the law and the referee must not certify up the whole of the evidence.³⁹

In re Kurtz, 11 A. B. R. 129, 125 Fed. 992 (D. C. Pa.): "The summary of the evidence is required in order to save the judge the labor of examining what is often a mass of testimony on many different questions, and of extracting so much as may be relevant to the point immediately in hand."

This certificate, setting forth a summary of the evidence, perhaps is

³⁹. Compare, *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 903 (C. C. A. Ky.).

analogous to an old fashioned bill of exceptions. Litigants are so accustomed in these days of shorthand reporters to consider the only permissible record of facts to be a verbatim stenographic report, that they lose sight of the real law, that verbatim report is not requisite. It would seem, upon reason, though the decisions do not state it as the law, that this certificate of facts really corresponds to a bill of exceptions, and properly might or might not thus be a verbatim report of all the testimony, so long as it shows all the evidence that is pertinent.⁴⁰

Compare, *In re Cohen*, 11 A. B. R. 443, 131 Fed. 391 (D. C. Mass.): "Creditors prayed a recommitment of the certificate in order that the referee might certify additional facts and evidence. If the appellants desire that the judge shall weigh the evidence and determine questions of fact, they should ordinarily procure that the evidence before the referee is taken down stenographically and by him certified to the judge. If this be deemed inadvisable on account of expense or for other reasons, the parties should specifically point out to the referee that testimony which they wish him to summarize in his report, and they should ask him for specific findings of fact on which they may rely at the hearing before the judge."

The rule also must be taken with the qualification of the other rule requiring the referee to take and report to the reviewing court all the evidence offered, except privileged evidence, etc., as laid down by other decisions.⁴¹

National Bank v. Abbott, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.): "A proceeding in bankruptcy is a proceeding in equity, and the taking of testimony therein and the review by appeals of hearings therein are governed by the same practice as they are in suits in equity, except where otherwise specified. A referee or the District Court taking testimony in a controversy or hearing in bankruptcy is required by that practice to take, record, and, in case of an appeal, to return to the appellate court, all the evidence offered by either party to the controversy, that which is held by them to be incompetent, irrelevant, or immaterial as well as that which they deem admissible, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and conclude the litigation without remanding the suit to procure the excluded evidence. From the general rule that all evidence offered should be received, the evidence of a privileged witness, privileged evidence, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted."

Rulings of a referee or of a District Court excluding evidence, where the evidence has not been incorporated in the record, are not reviewable in the Circuit Court of Appeals. The remedy for a refusal of a referee to

⁴⁰ Compare, *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.).

⁴¹ See ante, §§ 552, 1554; *Missouri Elec. Ry. Supply Co. v. Hamilton-*

Brown Co., 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.); *Bank v. Johnson*, 16 A. B. R. 208, 143 Fed. 463 (C. C. A. W. Va.).

take such evidence is by way of an application to the District Court, and, failing there, to the Circuit Court of Appeals, for an order that it be taken and preserved.⁴²

§ 2856. Remedies for Incomplete Record.—The parties may stipulate as to what is a complete record.⁴³

Also compare, analogously, *In re Robertshaw Mfg. Co.*, 14 A. B. R. 341, 135 Fed. 220 (D. C. Pa.): "The practice here has long prevailed of counsel agreeing, by stipulation filed, as to what the record shall contain, and in seven years there has only been found one case where there was a disagreement, but when that occurs and it is necessary to specify the record, the best practice which has prevailed in the local and in other districts, is to require the appellant to file a *praecipe* with the clerk, pointing out specifically what records in his judgment are necessary to be certified on the appeal."

The judge may order the record completed.⁴⁴

Obiter, *Crim v. Woodford*, 14 A. B. R. 307, 136 Fed. 34 (C. C. A. W. Va.): "If the judge desired a summary of the evidence, it was clearly within his province to direct the referee to prepare and submit it, and either party might have moved for an order to that effect; but the record does not show that any such motion was made. It may well be, in a question which involved the bona fides of the claims and the pecuniary condition of the bankrupt at the time the alleged liens were executed, that all of the testimony taken was pertinent to the issue, and that no summary thereof that the referee could prepare would have been acceptable to the parties to the controversy. In a case of this nature every question and answer presumably has some bearing upon the point at issue, and a skilled lawyer might find it difficult to prepare a satisfactory summary. However that may be, it seems to us that it would be manifestly unjust to deprive petitioners of the opportunity to be heard upon questions of substantial right because an officer of the court omitted to summarize the evidence in the belief that all of the testimony would the better present the questions at issue than any part of it which he might undertake to summarize."

If the verbatim report of the evidence is sent up instead of the proper mere summary of it, nevertheless the reviewing court will not deprive the petitioners on review of a hearing.⁴⁵ If the original testimony is sent up along with the certificate the reviewing court will, perhaps, not be bound by the findings.

⁴². *Nat'l Bk. v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.).

⁴³. *Bankr. Act*, § 29 (5) and (9). Compare, analogously, *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.).

As to proper practice when the parties disagree, analogously, see *In re Robertshaw Mfg. Co.*, 14 A. B. R. 341, 135 Fed. 220 (D. C. Pa.).

⁴⁴. Compare, practice in Circuit Court of Appeals, post, § 3011³; also *Keck v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio). Also, *Nat'l*

Bank v. Abbott, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.).

Expense of Completing Record, Whether Payable Out of Estate.—Compare *Keck v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

Appeal in Forma Pauperis.—Compare rules in Circuit Court of Appeals, *Keck v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

⁴⁵. *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.), quoted *supra*, § 2855.

Inferentially, *Mason v. Wolkowich*, 17 A. B. R. 719 (C. C. A. Mass.): "Of course, as the proofs are before us, we are bound only so far as our judgment approves them, by either the certificate of the referee or the opinion of the learned judge of the District Court, which, as is well settled, is in no sense a formal finding of the facts."

The judge, properly, should consider on review only the evidence thus certified to him.⁴⁶

§ 2857. Referee Also to Certify Findings of Fact.—The referee should also certify his findings as to the facts.⁴⁷

In *re Shea*, 11 A. B. R. 209, 126 Fed. 153 (C. C. A. Mass.): "There is no specific finding of facts by either the referee or the District Court, so that questions of law are not made for us in the manner in which we have said in our opinion. * * * (In *re Boston Dry Goods Co.*) the same should be presented."

In *re Yost*, 9 A. B. R. 154, 117 Fed. 792 (D. C. Pa.): "This record is in rather an unsatisfactory shape; the referee has found no facts, and I have therefore to pass upon the evidence which has been returned by him, without any knowledge of the witnesses by which to judge of their credibility."

Sometimes, however, the record may be helped out by presumptions.

Instance, In *re Shea*, 11 A. B. R. 209, 126 Fed. 153 (C. C. A. Mass.): "Nevertheless, we are able to make an adjudication to a limited extent, and probably so far as to cover the only substantial questions that could in any way have been brought before us.

"First of all, the omission from the record of any specific finding by the district court that the value of the equity in question exceeded \$500 is not material, because, on the ordinary rule, in the absence of anything to the contrary, the court must be assumed to have acted rightly, and therefore it must be further assumed that it found that the value of the equity was triple the price which the trustee was to receive therefor."

46. Compare similar proposition as to record in Circuit Court of Appeals, §§ 2958¼, 2967.

Judge Considering Evidence Outside of Record on Review.—In one case it appears the judge considered testimony and documents outside of the record on review, sustaining the referee's conclusions, but perhaps he so considered them at the request of the petitioner on review, who therefore could not complain. In *re Stokes*, 26 A. B. R. 256, 185 Fed. 994 (D. C. Ga.).

And it has been maintained in other cases that the facts shown on the record may be supplemented by other facts under certain circumstances, *Ex parte Cuddy*, 131 U. S. 280; *Ex parte O'Neal*, 11 A. B. R. 196, 125 Fed. 967 (C. C. A. Fla.). But compare analogously that the hearing will be confined to the questions involved in the issue tried before the referee, ante, §

2862; also, In *re Lorch & Co.*, 28 A. B. R. 784, 199 Fed. 944 (D. C. Ky.).

47. Bankr. Act, § 39 (a) (5): "Referees shall make up records embodying the evidence, or the substance thereof as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judge." Gen. Ord. No. 27.

In *re Taft*, 13 A. B. R. 419, 133 Fed. 511 (C. C. A. Ohio); inferentially, *Burleigh v. Foreman*, 12 A. B. R. 88, 125 Fed. 217 (C. C. A. Mass.); inferentially, *Dressel v. North State Lumber Co.*, 9 A. B. R. 542, 119 Fed. 531 (D. C. N. Car.).

DeVries v. Shanahan, 10 A. B. R. 518, 122 Fed. 629 (C. C. A. Md.); analogously, In *re Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 226 (C. C. A. Mass.); *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.).

§ 2858. Precise Question for Review to Be Stated Clearly and Distinctly.—The referee is also distinctly and clearly to state and certify the precise question for review;⁴⁸ for the hearing will be confined to the questions involved in the issue tried before the referee.⁴⁹

§ 2859. Petition and Certificate Transmitted by Referee to District Clerk.—Fourth, after the referee has certified to the facts, he transmits the petition for review, the certificate of facts and necessary files to the district clerk, for the use of the judge. And the order made by the referee, then, is not executed, if stayed, until the judge has acted on the petition for review and has certified to the referee his affirmance, reversal or modification of the order.⁵⁰

§ 2860. Stay of Execution of Order.—If the trustee files the petition for review, no stay bond is required in order to stay the execution of the referee's order pending the review. But if other parties file the petition, it has been held that a stay bond may be required.⁵¹

In *re Home Discount Co.*, 17 A. B. R. 168, 147 Fed. 538 (D. C. Ala.): "The insistence that the court has no right to make any rule for securing the costs on the petitions for review of the referee's order, and that it is powerless to exact bond or other indemnity for the protection of the opposite party during the stay of the order, pending the review, is wholly unfounded. In the absence of statutory provisions or rules of court, a petition to review or revise an order of the referee does not in and of itself operate a supersedeas of the order, and whether or not it shall have that effect, rests in the discretion of the reviewing or reviewed authority in the particular case. It has few of the properties of an appeal. Primarily, at least, it does not contemplate a trial de novo. It removes nothing out of the District Court into any other court. The petition, though filed with the referee, is really addressed to the District Court, and asks action by that court on a record which remains in that court. It is no more than a petition for a rehearing, or a motion for a new trial, in the court of original jurisdiction, while the judgment or decree remains in the power of the court during the term, and does not stay execution, unless in pursuance of rules or by special order. Aside from the inherent power of courts to provide rules for administering of justice therein, the court has abundant statutory authority to make all reasonable regulations, not inconsistent with those prescribed by law and the rules made by the Supreme Court, which it deems needful to prevent abuses or frivolous petitions for review. One of the rules in force, when the referee's order was made, provided 'that on hearings before referees in bankruptcy, and on nisi proceedings when the rule is made final, the filing of a petition for review shall not act as a supersedeas, unless the unsuccessful party

⁴⁸. In *re Milgraum & Ost*, 13 A. B. R. 337, 133 Fed. 802 (D. C. Pa.).

Compare, *Craddock-Terry Co. v. Kaufman*, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.), where an attempt was made to treat a "certificate" of the referee, where the bankrupt had refused to testify before adjudication of bankruptcy, as a "petition for review."

⁴⁹. Compare § 2856 note; also see In *re Lorch & Co.*, 28 A. B. R.

784, 199 Fed. 944 (D. C. Ky.).

⁵⁰. **Subsequent Orders of Referee as to Same Subject Not Reviewable Except by Additional Petitions for Review.**—Review of subsequent orders of the referee on the same matter may be had only on separate petition. *Ellis v. Krulewitch*, 15 A. B. R. 617, 141 Fed. 954 (C. C. A.).

⁵¹. Compare post, § 2979½.

shall file bond, with surety, in such amount as may be required by the referee or judge, conditioned to pay any damages growing out of said appeal, in event the same is not successfully prosecuted. Failure to comply with the order of the referee, unless petition for review and bond be filed and allowed by the referee, may be treated as a contempt of court.' The only regulation in the statute regarding the revision of orders of referees is that they are 'subject always to review by the judge.' No. 27 of the General Orders in Bankruptcy prescribes only the form in which the matter for review shall be presented to the judge, and does not deal with any question of costs or the effect of the filing of the petition as a supersedeas. Nearly every order the District Court makes is subject to revision on appeal or writ of error."

However, fairness prescribes that when exception is taken to an order, the order should not be executed by the trustee until opportunity be given the defeated party to appeal or to file his petition for review.

In *re Nichols*, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.): "Where there is an appearance and contest, referees should always see to it that the litigating parties are notified of his decisions. In such cases trustees should not execute orders for the payment of money until opportunity for appeal or review has been given. Application can be made to the referee or to the court for a stay of proceedings. Where creditors do not appear, or where they appear and their appearance is not noted, no such duty rests upon the referee. This is especially true where claims are presented and no objection is made thereto."

DIVISION 2.

HEARING UPON REVIEW OF REFEREE'S ORDER.

§ 2861. Referee's Order and Finding Presumed Correct, until Manifest Error Shown.—Upon review, the referee's order is to have the presumption in its favor; also his findings of fact are to have the same presumption.

It is for the petitioner on review to prove there is error. The reviewing court will hesitate especially to overturn the referee's findings of fact; for the referee is in the better position to judge of the testimony, since he heard it given, and noted the demeanor of the witnesses, and was in a position where he could feel the weight of the spoken words. Only manifest error will justify reversal on the facts.⁵²

⁵². In *re West*, 8 A. B. R. 564, 116 Fed. 767 (D. C. Ga.); In *re Shriver*, 10 A. B. R. 746, 125 Fed. 511 (D. C. Pa.); In *re O'Connor*, 9 A. B. R. 18, 114 Fed. 777 (D. C. Ga.); *Smith v. Evans*, 17 A. B. R. 433, 148 Fed. 89 (C. C. A. Ills.); In *re Covington*, 6 A. B. R. 373, 110 Fed. 143 (D. C. N. Car.), although this case has to do with his findings as special master, on discharge. In *re Waxelbaum*, 4 A. B. R. 120, 101 Fed. 228 (D. C. Ga.); inferentially, In *re Abbey Press*, 13 A. B. R. 11, 134 Fed. 51 (C. C. A. N. Y.); In *re Royce*

Dry Goods Co., 13 A. B. R. 257, 133 Fed. 100 (D. C. Mo.); In *re Tudor*, 2 A. B. R. 808, 96 Fed. 942 (D. C. Colo.); In *re Rider*, 3 A. B. R. 192, 96 Fed. 811 (D. C. N. Y.).

In *re Rome Planing Mills*, 3 A. B. R. 766, 99 Fed. 937 (D. C. N. Y.), a case of the review of a referee's findings as to insolvency, upon reference to him, as special master, of a petition for adjudication.

In *re Romine*, 14 A. B. R. 788, 138 Fed. 837 (D. C. W. Va., affirmed sub nom. *Bk. v. Johnson*, 16 A. B. R. 206),

In *re Noyes Bros.*, 11 A. B. R. 506, 127 Fed. 286 (C. C. A. Mass.): "Such question of fact having been passed upon by the referee and the District Court, it cannot be disturbed here upon appeal unless the proposition is clearly and unmistakably established that the finding of the tribunals below was erroneous. The statute authorizing appeals like the one here expressly provides for 'appeals as in equity cases.' That kind of an appeal being authorized, the proceeding thereunder would conform itself, as far as may be consistent with justice, to the ordinary course of equity procedure; and it is a familiar rule in equity that an appellate court will not interfere with findings of fact under such circumstances as appear here, unless the findings are clearly erroneous, or, as it is sometimes expressed, manifestly against the weight of evidence. Some cases go so far as to hold that a chancellor's findings will not be reversed where the appellate court cannot see that the decree is right, and where the evidence raises some doubt as to its correctness. But it is not necessary to go to that extreme in this case, for, while the evidence presented by the record is meager, there is nothing in the case to lead us to doubt the correctness of the finding below."

In *re Lawrence*, 13 A. B. R. 798 (C. C. A. N. Y.): "This court should not disturb these findings, unless they are manifestly unsupported by the evidence."

Compare, In *re Schulman*, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.): "Unless convinced that manifest error has been committed, this court should refrain from meddling with the administration of the estate which can safely be intrusted to the officers of the bankruptcy court who are familiar with the local environment and the character and conduct of the parties. In the case at bar we know nothing of the bankrupt, Schulman, except as he is por-

although this case has to do with his findings as special master on discharge.

In *re Stephens*, 8 A. B. R. 53, 114 Fed. 192 (D. C. Ga.); In *re Miner*, 9 A. B. R. 100, 117 Fed. 953 (D. C. Ore.); In *re Baernkopf*, 9 A. B. R. 133, 117 Fed. 975 (D. C. Pa.), although the case was that of a special master's findings on discharge.

Love v. Export Storage Co., 16 A. B. R. 171, 198, 143 Fed. 1 (C. C. A. Tenn.); In *re Harr*, 16 A. B. R. 213 (D. C. Mo.); analogously, (Master on discharge), In *re Lafleche*, 6 A. B. R. 483, 109 Fed. 307 (D. C. Vt.); analogously, (master on discharge), In *re Forth*, 18 A. B. R. 186, 151 Fed. 951 (D. C. N. Y.); analogously, (master on discharge), In *re Harr*, 16 A. B. R. 213 (D. C. Mo.).

Compare post, § 3009. In *re Hatem*, 20 A. B. R. 470, 161 Fed. 895 (D. C. N. Car.); In *re Kenyon*, 19 A. B. R. 194, 156 Fed. 863 (D. C. Ohio); In *re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.); *McNulty v. Wiesen*, 19 A. B. R. 783, 158 Fed. 221 (D. C. Pa.); impliedly, In *re Wheeler*, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.); In *re Hoffman*, 23 A. B. R. 19, 173 Fed. 234 (D. C. Wis.); In *re MacKissic*, 22 A. B. R. 817, 171 Fed. 259 (D. C. Pa.); (Special Master) *Fouche v. Shearer*, 22 A. B. R. 828, 172 Fed. 592 (D. C. Ga.);

In *re Landsberger*, 24 A. B. R. 107, 177 Fed. 443 (D. C. Ga.), analogously (master on discharge), In *re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.); In *re Malschick & Levin*, 30 A. B. R. 237, 206 Fed. 71 (D. C. Pa.); *Deupree v. Watson*, 32 A. B. R. 407, — Fed. — (C. C. A. Ky.); In *re Katz*, 32 A. B. R. 422, — Fed. — (D. C. N. J.); *Salsburg v. Blackford*, 29 A. B. R. 320, 204 Fed. 438 (C. C. A. W. Va.); [but are not conclusive], In *re Hawks*, 30 A. B. R. 365, 204 Fed. 309 (D. C. Kans.); In *re Calvi*, 26 A. B. R. 206, 185 Fed. 642 (D. C. N. Y.); In *re Bonner*, 26 A. B. R. 321, 189 Fed. 93 (D. C. Ohio); In *re Hutchins Co.*, 24 A. B. R. 647, 179 Fed. 864 (D. C. N. Y.); In *re Wright-Dana Hardware Co.*, 30 A. B. R. 582, 205 Fed. 335 (D. C. N. Y.); In *re Walden, etc., Co.*, 29 A. B. R. 80, 199 Fed. 315 (D. C. Ga.); In *re Geiver*, 28 A. B. R. 413, 193 Fed. 128 (D. C. S. Dak.); In *re Dorr*, 28 A. B. R. 505, 196 Fed. 292 (C. C. A. Cal.); In *re Solloway & Katz*, 28 A. B. R. 229, 196 Fed. 132 (D. C. Conn.); In *re Cox*, 29 A. B. R. 456, 199 Fed. 952 (D. C. N. Mex.); In *re Brenner*, 26 A. B. R. 646, 190 Fed. 209 (D. C. Pa.); In *re C. M. Montgomery*, 25 A. B. R. 431, 185 Fed. 955 (D. C. Tex.); In *re Atcherly*, 25 A. B. R. 827 (D. C. Hawaii); In *re O'Neill*, 27 A. B. R. 5, 189 Fed. 1010 (D. C. N. Y.).

trayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. The referee certified that after having taken the oath the bankrupt refused to be examined according to law and deliberately withheld facts within his knowledge as to the disposition of the property of the bankrupt's firm. Again, he certifies that the bankrupt withheld from the trustee and the court, with the deliberate intention of concealing his condition, the true facts relating to the conduct of his business, his dealings with his creditors and the amount and whereabouts of his property. The referee says: 'The manner of the bankrupt, his recollection when he desired to exercise it, convinced me as I watched him that where he desired to give the facts he could do so.' Disingenuous and evasive as his testimony appears when read, it is obvious, that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers, 'I don't remember,' and 'What do you mean?' so often given, might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose."

Southern Pine Co. v. Savannah Trust Co., 15 A. B. R. 621, 141 Fed. 802 (C. C. A. Ga.): "The established rule in such cases, from which we see no reason for departing in the present instance, seems to be that the findings of fact, dependent upon conflicting testimony, by a judge, master, or a referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part."

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. * * * Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion and the weight of authority is, that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice."

Compare, *Buckingham v. Estes*, 12 A. B. R. 182, 128 Fed. 584 (C. C. A. Tenn.): "The master and the court below concurred in the finding of facts, and when that is the case this court will not reverse or modify unless a very plain mistake is definitely pointed out."

Inferentially, *In re Kolin*, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.): "The master had the witnesses before him, saw their manner of testifying, and is better able to solve the riddle than we could upon this record."

Compare, *Neumann v. Blake*, 24 A. B. R. 575, 178 Fed. 916 (C. C. A. Mo.): "Recognizing and reaffirming the rule, so often announced by the courts, that the findings of a referee are not to be lightly set aside, and that a judge will not interfere with his conclusions on questions of fact, unless convinced that they are manifestly against the evidence, we think the finding of the referee was so manifestly erroneous that it ought not to be allowed to stand."

In *re Wright-Dana Hardware Co.*, 30 A. B. R. 582, 205 Fed. 335 (D. C. N. Y.): "On the first trial certain witnesses who knew the facts, or who claim to know them, were not present. On this trial they were present and gave their version of the case. The referee saw and heard them, and this court cannot say it was error to give them full credit. The court should not reverse the finding of a referee on disputed questions of fact, except for substantial errors in rulings, or when the findings are clearly contrary to or unsupported by the evidence."

In *re Hodge*, 30 A. B. R. 522, 205 Fed. 824 (D. C. N. Y.): "The referee's findings upon conflicting evidence, or when different inferences may be drawn from the same state of facts, are entitled to the same consideration as those of a district judge."

In *re Stout*, 6 A. B. R. 505, 109 Fed. 794 (D. C. Mo.): "It is the recognized rule of the Federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court."

Couts v. Townsend, 11 A. B. R. 126, 126 Fed. 249 (D. C. Ky.): "The referee had before him the only witness who testified, and certainly the conclusion reached could fairly be drawn from the testimony. While it might possibly admit of doubt, still the finding by the referee is not, to say the least, so flagrantly against the evidence as to require it to be set aside. It is not the habit of the court, under these circumstances, to overrule its referees on mere findings of facts, though the court should not hesitate to do so if the findings were flagrantly against the weight of the testimony."

In *re Simon & Sternberg*, 18 A. B. R. 205 (D. C. Ga.): "The finding of the referee is entitled to the same consideration as that of a district judge upon conflicting evidence, as in an admiralty case, or in any other case where the judges pass upon the facts, if that finding is under review by an appellate tribunal. The *Inca* (C. C. A.), 148 Fed. 367 (opinion of Meek, District Judge, sitting with Pardee and Shelby, Circuit Judges). This court is an appellate tribunal from the rulings of the referee, but when there is evidence to support those rulings—however ingenious the suggestions to the contrary—the court will not be insistent to scan those rulings so as to find some point on which there might be a difference as to their correctness. A fine argument can be based upon almost any accumulation of facts, both pro and con, but, when the court has intrusted this particular duty to the referee, and it has been apparently well performed, the ruling should not be disturbed."

In *re Williams*, 9 A. B. R. 731, 120 Fed. 542 (D. C. Ga.): "The report of the referee on questions of fact is presumed to be correct until the contrary is shown."

In *re Littman*, 20 A. B. R. 300, 159 Fed. 233 (D. C. Pa.): "This case illustrates admirably the value of the rule, that findings of fact made by a tribunal before whom the parties and the witnesses have appeared and been examined are not to be lightly set aside. From the record now before the court, which I have read attentively from beginning to end, it is very difficult, if not impossible, to ascertain with even a fair degree of certainty what really oc-

curred during the three or four weeks under investigation. Both Littman and Zaretsky are of foreign extraction, apparently more at home in some other tongue than English, and the stenographer's notes seem frequently to indicate either that the questions of counsel were not accurately understood, or that the witness could not command sufficient English words to express his answers with clearness. Under such circumstances, experience has shown abundantly that it is almost essential that the witness should be seen and heard in order that one may feel a reasonable confidence that the answers have been understood in the sense intended by the speaker. Without the aid of sight and hearing, a mere transcript of his words may be nearly, if not quite, unintelligible, and at the best is likely to be confusing. In the present case, however, I have been able to see with sufficient distinctness, that there is a substantial conflict of testimony upon the vital point whether there was an oral agreement of partnership between Littman and Zaretsky that should affect the distribution of the fund arising from the receiver's sale, but I have found it impossible to conclude that the referee was clearly wrong in finding that the fact of such partnership had not been established."

In *re* Braselton, 22 A. B. R. 419, 169 Fed. 960 (D. C. Ga.): "It is well understood that the findings of referees in bankruptcy upon questions of fact are not to be disturbed unless clearly erroneous."

In *re* Schwartz, 23 A. B. R. 37, 179 Fed. 767 (D. C. N. Y.): "It is perfectly clear that such contradiction can be satisfactorily resolved only by the tribunal which sees the witness. Other explanations are possible than that of perjury, and when a competent master has concluded that the true explanation is not perjury, a judge should not upset his finding simply upon the basis of the written words. They constitute but a small part of the evidence, the bearing of the witness, his appearance, his general intelligence, and deportment, counting as much as the words he uses. Nothing is more certain than that great weight should be given to the finding of the tribunal which had before it all this evidence in its entirety. It is true in this case that with some of the master's findings I disagree, as, for example, on the value of the licenses, of the insurance policy and of the jewelry, but that does not militate against the correctness of his finding as to this issue, for in all of those matters my difference from him does not turn upon the credibility of a witness."

In *re* Wood, 2 A. B. R. 695, 95 Fed. 946 (D. C. N. Car.): "But when there is manifest error, as in this case, the judge will look into the record, and correct the error."

In *re* Shults, 14 A. B. R. 378, 135 Fed. 623 (D. C. N. Y.): "The cases hold that a referee must exercise sound judicial discretion in disposing of questions of fact, and his conclusions ordinarily will not be disturbed unless manifestly against the weight of evidence."

In *re* Cole, 14 A. B. R. 389, 135 Fed. 439 (D. C. Me., affirmed in 144 Fed. 392, 16 A. B. R. 302): "The referee had the witnesses before him. He conducted the examination of the bankrupt herself, saw her appearance, and was the proper tribunal to decide the question of fact submitted to him. After full examination of the testimony, I cannot say that I should have come to a different conclusion. In any event, the conclusion of a competent referee, who has seen the witnesses, is entitled to great weight."

But see In *re* Grant Bros., 9 A. B. R. 93, 118 Fed. 73 (D. C. N. Y.): "The referee has found in favor of Grant's contention, and ordinarily his finding would be accepted, as he had the opportunity of hearing Grant and other witnesses testify, though not Stearns, whose testimony was taken by deposition in Colorado, but my special attention to the matter is asked by reason

of certain testimony in the case which it is urged must have been overlooked by the referee or was ignored by him because inconsistent with Grant's statements on the witness stand. The contention is, that from Grant's own letters, from the books kept by him and from his own admissions when examined, it conclusively appears that his testimony with respect to the agreement is unworthy of belief. * * *

"The decision of the referee is reversed and the matter is remitted to him for further proceedings in conformity herewith."

In *re Marsh*, 8 A. B. R. 588, 116 Fed. 396 (D. C. Conn.): "In the decision of questions of fact I must depend upon the conclusions arrived at by the referee. He has every opportunity for arriving at the truth."

In *re McCann Bros. Ice Co.*, 22 A. B. R. 555, 171 Fed. 265 (D. C. Pa.): "* * * the case presents the familiar situation of a conflict of evidence—much of it from the mouths of witnesses who appeared before the referee—which has been settled by the findings of fact. The courts have often said that such a finding should not be disturbed except for plain mistake."

But no precise quantitative weight will be assigned to the referee's findings of fact;⁵³ and where there is no distinct finding of fact upon the particular question involved, the reviewing court will not attach the weight that is usually accorded to the findings of courts of first instance.⁵⁴

And where the evidence is not in serious conflict, and the conclusions drawn by the referee are deduced from a peculiar state of facts but are not sufficiently supported by the evidence, the reviewing court will not be bound by his conclusions, simply because the witnesses appeared before him and he could note their demeanor.⁵⁵

And if it be a deduction from established facts the referee's finding would not carry as much weight as where there is a serious conflict in the evidence, for the judge having the same facts, is in an equal position for the drawing of conclusions.⁵⁶

In *re McDonald & Sons*, 24 A. B. R. 446, 178 Fed. 487 (D. C. S. Car.): "The rule is upon an appeal from a referee to accept his conclusions on questions of fact, unless the same are manifestly erroneous, and that is because he hears the testimony, can note the demeanor of witnesses, and is in a better position to determine the weight of the spoken words. If there was any conflict in the testimony, any question, the determination of which was affected by the credibility of the witnesses I would refuse to disturb his conclusion. Such is not the case here, for there is no conflict in the testimony, and the case turns upon the inference to be drawn from the proved or admitted facts, and I can no more escape drawing my own inferences than from the performance of any other judicial duty."

The weight given to the referee's findings applies more particularly to

⁵³ In *re Swift*, 9 A. B. R. 237, 118 Fed. 343 (D. C. Mass.); *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted *supra*; In *re Big Cahaba Coal Co.*, 26 A. B. R. 910, 190 Fed. 900 (D. C. Ala.); *Baumhauer v. Austin*, 26 A. B. R. 385, 186 Fed. 260 (C. C. A. Ala.).

⁵⁴ *Burleigh v. Foreman*, 12 A. B. R.

91, 139 Fed. 13 (C. C. A. Mass.).

⁵⁵ In *re People's Department Store*, 20 A. B. R. 244, 159 Fed. 286 (D. C. N. Y.); *Baumhauer v. Austin*, 26 A. B. R. 385, 186 Fed. 260 (C. C. A. Ala.).

⁵⁶ *Ohio Valley Bank v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio); In *re McCrary Bros.*, 22 A. B. R. 161, 169 Fed. 485 (D. C. Ala.).

cases in which such findings are deduced from conflicting evidence and depend upon the credibility of witnesses, and not to cases where different inferences may be drawn from established facts.⁵⁷

Where the record upon a petition to revise does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law, apparent upon the face of the record, may be considered.⁵⁸

It has been held, however, that the referee's findings and conclusions are not conclusive to the same extent as a verdict of a jury or a finding of facts made by the judge in an action at law where a jury has been waived.⁵⁹

§ 2861½. Decision Below on One Ground, Nevertheless Other Grounds Available to Respondent on Review.—The respondent, upon review of an order affirming the findings of a referee, may rely on any ground disclosed by the record, even though it be not the ground upon which the decision was made.

Davis v. Crompton, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.): "In maintaining the decision of the referee, as affirmed by the District Court, the appellees may rely upon any ground disclosed by the record upon which that decision might be thought to be maintainable, even though it be not the ground upon which that decision was made."

§ 2862. Points Not Discussed Below, Whether Considered on Review.—It has been held, contrary to the usual rules in appellate courts, that points not adverted to in the hearing before the referee, may nevertheless be considered on review if appearing sufficiently in the record.⁶⁰

However, it has been held that if the point is not pressed before the referee, it will be held by the District Judge to be waived.⁶¹

Thus, objections to evidence received by a referee may not be raised for the first time on review of an order made by him.⁶²

In re Wilde's Sons, 16 A. B. R. 386, 144 Fed. 972 (C. C. A. N. Y.): "We are clearly of the opinion that when a District Court is reviewing an order or report of a referee in bankruptcy, under the very broad provisions of § 2 (10) it may properly consider any point presented by the record then before it whether such point was or was not discussed before or by the referee."

And it has been held that the hearing will be confined to the questions involved in the issue tried before the referee.⁶³

⁵⁷. *In re Big Cahaba, etc., Co.*, 25 A. B. R. 761, 183 Fed. 662 (D. C. Ala.).

⁵⁸. *In re Baum*, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.).

⁵⁹. *In re Hawks*, 30 A. B. R. 365, 204 Fed. 309 (D. C. Kans.).

⁶⁰. Compare, contra, rule as to review of orders of the district court, by the circuit court of appeals, post, § 3001.

⁶¹. *In re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.).

⁶². *In re McCann Bros. Ice Co.*, 22 A. B. R. 555, 171 Fed. 265 (D. C. Pa.).

Introducing New Evidence before District Judge.—It was held in an obiter that new evidence might be considered by the District Judge on review of a referee's order, *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.). Such a rule, however, is subversive of due order, if not directly contrary to bankruptcy rules.

⁶³. *In re Lorch & Co.*, 28 A. B. R. 784, 199 Fed. 944 (D. C. Ky.).

§ 2863. **Remanding for Further Testimony Where Referee's Order Disallowing Claim at Close of Claimant's Evidence in Chief Reversed.**—On reversal of the referee's order disallowing a claim, on motion, at the close of the claimant's case in chief, the reviewing court should not allow the claim, but should remand the case with instructions to give the trustee a chance to introduce evidence in defense of his objection.⁶⁴

64. In re Livingston, 16 A. B. R. 385, 144 Fed. 971 (C. C. A. N. Y.).

CHAPTER LVII.

APPEALS, REVIEWS AND ERROR PROCEEDINGS FROM DISTRICT COURTS TO THE CIRCUIT COURTS OF APPEAL.

Synopsis of Chapter.

- § 2864. Fundamental Distinction between Steps "in Bankruptcy Proceedings" Proper and Incidental "Controversies."
- § 2865. Thus, Adjudication of Bankruptcy, or Its Refusal, a Question "in Bankruptcy Proceedings" Proper.
- § 2865½. Likewise, Discharge.
- § 2866. Likewise, Allowance or Refusal of Exemptions.
- § 2867. And Allowance or Rejection of Claim to Share in Dividends or in Marshaling of Firm and Individual Estates.
- § 2868. Exceptions to Trustee's Reports and Allowance or Disallowance of Costs and Expenses of Administration—Such as Attorneys' Fees.
- § 2869. Even Validity and Priority of Lien May Be, if Incident to Allowance or Rejection of Creditor's Claim for Share in Dividends.
- § 2870. But if Sole Controversy About Lien or Priority, None About Debt, Not a Question "in Bankruptcy Proceedings" Proper.
- § 2871. And Claim Controverted Must Be Creditor's Claim, Else Not.
- § 2872. Seizures on Warrants to Marshal, Proceedings in Bankruptcy.
- § 2873. Trustee's Petitions for Summary Surrender of Property.
- § 2874. Trustee's Plenary Suits in U. S. District Court to Recover Property Fraudulently or Preferentially Transferred, Not Bankruptcy Proceedings Proper.
- § 2875. Nor Are Intervening Petitions Claiming Property in Custody of Bankruptcy Court, or Liens Thereon.
- § 2876. But Orders of Sale and Controversies Incident Thereto, Proceedings in Bankruptcy Proper and Not "Controversies."
- § 2877. Unless Real Controversy Not about Order of Sale nor Claim, but about Lien or Title Itself.
- § 2878. Thus, Trustee's Petition to Marshal Liens on Property in His Custody and to Enjoin Interference Not "Proceedings in Bankruptcy" but "Controversy."
- § 2879. Marshaling of Firm and Individual Assets and Debts in Partnership Bankruptcies.
- § 2879¼. Contempt Proceedings.
- § 2879½. Confirmation of Composition.
- § 2880. When to Appeal, When to Petition for Revision or Writ of Error.
- § 2881. Distinction Between Writ of Error and Appeal Preserved.
- § 2881½. Distinction Between Appeal and Petition to Revise.
- § 2882. Also Between Writ of Error and Petition to Revise.
- § 2883. Holding That Resort to Appeal or Petition to Revise Optional in Proper Case.
- § 2884. Thus, in "Controversies."
- § 2885. If Facts Undisputed, Petition to Revise Only Remedy.
- § 2886. If Facts Disputed, May Be Reviewed Only if Appeal Available.
- § 2887. Holdings That Right to Appeal or Writ of Error under § 24 (a) and Petition to Revise under § 24 (b) Mutually Exclusive.

- § 2888. Appeal under § 25 (a) Exclusive Method of Review in Three Cases Specified.
§ 2888½. Erroneous Holding as to Appealability; Decree Not a Mere Nullity.

DIVISION 1.

SUBDIVISION "A."

- § 2889. Appeals in Bankruptcy Proceedings Proper.
§ 2890. Order Appealed from Must Be Final Order.
§ 2891. Right of Appeal Cannot Be Enlarged nor Restricted by Court.
§ 2892. Such Appeals Permissible Only as to Adjudication, Discharge and Allowance of Claims.
§ 2893. First: Appeals from Adjudications or Refusals to Adjudge Bankrupt.
§ 2894. But No Appeal if Jury Trial Had.
§ 2895. Second: Appeals from Judgments Granting or Denying Discharge.
§ 2896. Includes Judgment Confirming a Composition.
§ 2896¼. Whether Includes Refusing to Confirm Composition.
§ 2896½. Thus, as to Application for an Extension of Time to Apply for Discharge.
§ 2897. Also Dismissals of Discharge for Want of Prosecution.
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§ 2899. Amount in Dispute, Not Amount of Entire Claim, Governs.
§ 2900. Debt Must Have Been Owed by Bankrupt, Mere Lien on Property Insufficient.
§ 2901. Where Lien or Priority Incident to Disputed Debt, Its Validity, Priority, etc., Appealable.
§ 2902. But Where Debt Undisputed Mere Fact That Lien or Priority Incident to Debt Is Disputed, Insufficient.
§ 2903. Not to Split Case and Dismiss Portion Affecting Lien or Priority.
§ 2904. "Claim" Refers Only to Money Demand.
§ 2905. And to "Claims" Presented for "Proof" against Bankrupt Estate.
§ 2906. And Not to "Claims" for Exempt Property.
§ 2906½. Nor to Accounts or Reports of Trustees.
§ 2907. Nor, Probably, to "Claims" for Costs and Expenses of Administration.
§ 2908. Nor to "Claims" of Strangers to Property in Trustee's Possession, nor of Trustee to Property in Strangers' Hands.
§ 2909. Disallowance of Claim because Preference Not Surrendered, Appealable.
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§ 2911. No Appeal in Bankruptcy Proceedings Proper Except in Three Cases of § 25 (a) Mentioned.

SUBDIVISION "B."

- § 2912. Appeals in "Controversies Arising in Bankruptcy Proceedings."
§ 2913. Appeal a Matter of Right, Not to Be Enlarged nor Restricted by Court.
§ 2914. Under § 24 (a) Both Law and Fact Reviewed.
§ 2915. Whether Litigant Has Option, in Proper Case, Either to Appeal or to Petition for Revision.
§ 2916. May Treat "Appeals" as Petitions for Revision.
§ 2917. But Not Where Facts Disputed.
§ 2918. Simultaneous Appeal and Petition for Review.
§ 2919. Single Assignment of Errors Sufficient Where Appeal and Error Simultaneously Prosecuted.

- § 2920. Appeals in "Controversies" Only Allowable in Cases within Act of Congress Establishing Circuit Courts of Appeal.
- § 2920½. Amount Not Limited.
- § 2921. Decree in Equity Not Reviewable by Writ of Error, nor Judgment at Law by Appeal.
- § 2922. Must Be "Final" Order.
- § 2923. Validity, Priority, etc., of Liens Appealable as "Controversies."
- § 2924. Summary Order on Third Party to Surrender Assets, Appealable as "Controversy."
- § 2925. Likewise, Summary Order on Trustee or Receiver to Surrender Assets to Third Party.
- § 2926. Plenary Suits in U. S. District Courts by Adverse Claimants in Possession to Enjoin Trustees, Appealable as "Controversies."
- § 2927. Also, Plenary Suits by Trustees in U. S. District Court to Recover Property Preferentially or Fraudulently Transferred.

DIVISION 2.

SUBDIVISION "A."

- § 2928. Petition to Revise Sole Method of Review in Bankruptcy Proceedings Proper, Except in Three Cases of § 25 (a).
- § 2929. Limited to Matters of Law under § 24 (b).
- § 2930. Thus, Exemptions Reviewable Only by Petition to Revise.
- § 2931. Likewise, Reopening or Refusal to Reopen Closed Estates.
- § 2932. Administrative Orders Reviewable under § 24 (b).
- § 2933. Attorneys' Fees and Other Expenses of Administration.
- § 2935. Orders on Nonbankrupt Partners to File Schedules or Surrender Firm Assets.
- § 2936. Likewise, Distribution between Firm and Individual Creditors.
- § 2937. Also, Orders of Sale and Controversies Incident Thereto, Reviewable under § 24 (b).
- § 2938. And Summary Orders on Bankrupts and Others to Surrender Assets or Execute Instruments.
- § 2939. Allowances to Widow and Children on Death of Bankrupt Pending Adjudication.
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SUBDIVISION "B."

- § 2940. Error Proceedings in "Controversies" and in Independent Plenary Suits.
- § 2941. Whether § 24 Applies Only to Orders in Proceedings in Bankruptcy Themselves, Not to Orders in Independent Plenary Suits.
- § 2942. Section 24 (b) Authorizes Review Only of Law, Not Facts.
- § 2943. Intervening Petitions Claiming Property or Funds in Custody of Bankruptcy Court or Claiming Liens or Other Interests Therein Reviewable by Petition to Revise.
- § 2943½. Thus, Summary Orders on State Court Officers or Other Third Parties to Surrender Assets.

DIVISION 3.

- § 2944. Brief Resume.

SUBDIVISION "A."

- § 2945. Procedure on Error to Be by Writ of Error or Petition to Revise, and Notice.

- § 2945½. If by Writ of Error.
- § 2946. If by Petition to Revise, Filing of Petition and Notice, Sole Requirements.
- § 2947. Petition for Review to Be Filed.
- § 2947½. Even by Prevailing Party, if Cross Errors Claimed.
- § 2948. Petition to Set Forth Order Complained of.
- § 2949. How Far to Set Forth Issue on Which Erroneous Order Made.
- § 2950. Record to Set Forth Order Complained of.
- § 2951. And to Present, Clearly, Issues of Law.
- § 2952. Also, to Show Insufficiency of Grounds for Order.
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- § 2997. By Analogy Should Be Filed within Six Months' Time.
- § 2998. At Least in All Cases of "Controversies."
- § 2999. Time for Review in Bankruptcy Proceedings Proper, Whether Ten Days by Analogy.
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- § 3005. Plain Error Noticed, Though Not Raised by Parties Themselves.
- § 3006. Issues Directly Raised by Pleadings Considered, Though First Made Point of on Appeal.
- § 3007. Findings of Fact, or Equivalent, Essential to Show Issues Same.
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- § 3009. Judgment on Facts Not Disturbed Except for Manifest Error.
- § 3010. Trivialities Not Considered—Substantial Interest to Be Shown.
- § 3011. Clerical Mistakes Disregarded.
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SUBDIVISION "F."

- § 3012. Enforcing Mandate of Appellate Court.
- § 3012½. Proceedings on Reversal and Remand without Prejudice.

§ 2864. Fundamental Distinction between Steps "in Bankruptcy Proceedings" Proper and Incidental "Controversies."—The distinction between questions arising in the regular course of bankruptcy proceedings and incidental controversies at law or in equity arising out of bankruptcy proceedings, lies at the base of the subject of appeals and reviews in bankruptcy matters under the present law.¹

Snow v. Dalton, 29 A. B. R. 240, 203 Fed. 843 (C. C. A. N. Car.): "We think that the latter phrase ['controversy arising in bankruptcy proceedings'] as used in the Bankruptcy Act must be limited to cases where third parties claim not in and under the administration of the bankrupt's estate in bankruptcy, but, on the contrary, asserts some right hostile to the title of the trustee or going to the right of the court to administer the particular estate in the bankruptcy case."

The subject of the review of referees' orders by the district judge just completed is simple. But the subject of reviews and appeals in bankruptcy matters from the district courts and from the circuit courts of appeal to the higher courts is confusing.

Thomas v. Woods, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.): "At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition? The confusion existing on this subject has been frequently confessed by the courts. In *re McMahon* (C. C. A.), 17 Am. B. R. 530, 147 Fed. 684; *Coder v. Arts*, 213 U. S. 223, 232, 22 Am. B. R. 1, 29 Sup. Ct. 436, 54 L. Ed. —. The classification of matters in bankruptcy as 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' is vague and in actual application has bewildered the courts and the legal profession. It is quite manifest that, when the decision of a trial court in a 'bankruptcy proceeding' is brought under review in an appellate court, it presents a 'controversy,' and of necessity this is also a 'controversy arising in a bankruptcy proceeding.' The phrases, therefore, upon which this classification is based are tautological. Again, the Bankruptcy Act * * * itself uses the phrase 'proceedings in bankruptcy' in a double sense. Section 23 provides as follows: 'The United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy between trustees as such, and adverse claimants, concerning the property acquired or claimed by the trustees,' etc. Here the term 'proceedings in bankruptcy' embraces 'controversies arising in bankruptcy proceedings,' as well as 'bankruptcy proceedings proper,' and sets them both over against plenary suits between trustees and adverse claimants (instituted by bill or complaint, with subpoena or summons), touching rights or property not in the custody of the court. In § 24b, however, the term 'proceedings in bankruptcy,' as construed by the courts, has been given a narrower meaning, and has been set over against 'controversies arising in bankruptcy proceedings,' as used in § 24a. Here it has been thought to mean any of the administrative acts intervening between the filing of the petition and the granting of the discharge, as distin-

1. Bankr. Act, §§ 23, 24, 25.

The distinction here remarked has no essential relation to the "custody of the res," as was the case when the matters of "Conflict of Jurisdiction," "Jurisdiction over Adverse Claimants,"

"Summary Orders on Bankrupts, etc.," "Marshaling of Liens," etc., were under consideration. The distinction here turns not on the possession of the property but upon the nature of the controversy.

guished from those 'controversies arising in bankruptcy proceedings' on petition, which would have been the subject of plenary suits if the estate had not been in the custody of a court of bankruptcy. The confusion that has resulted from the attempt of the courts to apply this classification to actual litigation affords strong support for the decisions of this court that the methods of review provided by the Bankruptcy Act are not mutually exclusive, but cumulative. In *re McKenzie* (C. C. A.), 15 Am. B. R. 679, 142 Fed. 383; *Dodge v. Norlin* (C. C. A.), 13 Am. B. R. 176, 133 Fed. 363; In *re Holmes* (C. C. A.), 15 Am. B. R. 689, 142 Fed. 391."

However, there is a fundamental distinction taken between questions arising in bankruptcy proceedings that, if kept in mind, will tend to clear up many difficulties.

There are, as already seen, various steps in the progress of bankruptcy proceedings required to be taken in order to carry out the peculiar objects of bankruptcy law; among which might be mentioned the adjudication of the bankrupt, the allowance of claims for the purpose of sharing in dividends, the allowance and payment of expenses and costs of administration, the sale of assets, the declaration of dividends, the discharge of the bankrupt,³ the setting apart of exempt property, etc., etc. These steps are peculiar to bankruptcy law and are necessarily taken in the regular course of almost every bankruptcy case, and issues arising therein are differentiated from other issues that may come up in the course of the litigation.⁴

There are numberless other questions likely to arise in the course of administering bankrupt estates that do not involve the peculiar features of bankruptcy law, nor directly aid in carrying out its special objects, but are incidental to the administration of almost any estate in the hands of any court. Such are controversies arising between the trustee and strangers who claim he has possession of property belonging to them, or in which they have an interest, or on which they have a lien; and between the trustee and other persons, who, he claims, have possession of property belonging to him, etc., etc. Such controversies have to be decided, and the bankruptcy court is, in many instances, as previously noted, the proper forum for their decision; but they are rather controversies arising out of the settlement of bankruptcy estates, than controversies peculiar to bankruptcy proceedings themselves. They are not steps in the regular course of bank-

3. *Edelstein v. U. S.*, 17 A. B. R. 654, 149 Fed. 636 (C. C. A. Minn.).

4. Note to *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa); note to *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. Car.).

Also, see *Hewitt v. Berlin Machine Co.*, 11 A. B. R. 709, 194 U. S. 296; *Elliott v. Toeppner*, 9 A. B. R. 50, 187 U. S. 327, 333, 334. Compare, *Spencer v. Duplan Silk Co.*, 11 A. B. R. 563, 191 U. S. 526; *Hutchinson v. Otis*, 10 A. B. R. 275, 123 Fed. 14 (C. C. A. Mass., affirmed in 10 A. B. R. 133, 190 U. S.

552); *Duncan v. Landis*, 5 A. B. R. 649, 106 Fed. 839 (C. C. A. Pa.); In *re Columbia Real Estate Co.*, 7 A. B. R. 441, 112 Fed. 645 (C. C. A. Ind.); In *re Rusch*, 8 A. B. R. 520, 116 Fed. 270 (C. C. A. Wis.); *Doroshov v. Ott*, 14 A. B. R. 37, 134 Fed. 740 (C. C. A. N. J.); *Mason v. Wolkowich*, 17 A. B. R. 715, 150 Fed. 699 (C. C. A. Mass.); *Odell v. Boyden*, 17 A. B. R. 759 (C. C. A. Ohio); In *re Levitt*, 11 A. B. R. 411 (D. C. Wis.). Compare, In *re Farrell*, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio).

ruptcy proceedings. This, at any rate, is the distinction evidently drawn in practice under the present law.

Now, questions peculiar to bankruptcy proceedings proper can only be brought to higher courts for review or on appeal under the terms and limitations and in the cases prescribed by the bankruptcy law itself, in §§ 24 (b) and 25 (a). But these other controversies, these that are common and general incidents to the administration of estates everywhere, that is to say, "controversies arising in the course of the administration of bankrupt estates," are unaffected by the provisions of the bankruptcy law itself regulating appeals, and are regulated wholly by the usual practice in federal courts in similar cases, as adopted by § 24 (a) of the act. This distinction lies at the base of the subject of reviews and appeals in bankruptcy matters under the present law.⁵

Bank v. Chicago Title & Trust Co., 198 U. S. 280, 14 A. B. R. 102 (reversing 11 A. B. R. 79): "The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in §§ 23, 24 and 25 of the present Act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction."

First Nat'l Bk. of Denver *v. Klug*, 186 U. S. 202, 8 A. B. R. 12: "The words 'bankruptcy proceedings' are used in this section (§ 25) in contradistinction to controversies arising out of the settlement of the estates of bankrupts, as they are also so used in §§ 23 and 24. * * *

"Apart from § 25, the Circuit Courts of Appeal have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on certiorari, or in certain cases by appeal, under § 6 of the act of 1891."

Holden v. Stratton, 191 U. S. 155, 10 A. B. R. 789: "The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in §§ 23, 24 and 25 of the present act, and the provisions as to revision in matters of law and appeals were framed and must be construed in view of that distinction."

Compare (although the distinction being made in the decision is between proceedings and controversies together concerning property in the custody of the bankruptcy court, as distinct from independent suits concerning property not in its custody, rather than between proceedings themselves and controversies). *Bardes v. Bank*, 4 A. B. R. 170, 178 U. S. 524: "In *Lathrop v. Drake* (1875), 91 U. S. 516, the jurisdiction conferred on the District Courts and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this court speaking by Mr. Justice Bradley, as consisting of 'two distinct classes; first, jurisdiction, as a court of bankruptcy, over the proceedings in Bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bank-

5. *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.), quoted at § 2876.

In one case the distinction between "proceedings in bankruptcy" proper and "controversies arising, etc.," has

been rested on another ground, namely, the existence or non-existence of summary jurisdiction. *Clay v. Waters*, 24 A. B. R. 298, 178 Fed. 385 (C. C. A. Mo.).

rupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him,' and the jurisdiction of the District and Circuit Courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of section 1 of that act, giving to the District Court original jurisdiction of proceedings in bankruptcy, and of § 2, giving to the Circuit Court supervisory jurisdiction over such proceedings, but wholly under the distinct clause of § 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought 'by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.'"

In *re Mueller*, Trustee, 14 A. B. R. 256, 135 Fed. 711 (C. C. A. Ky.): "By 'controversies arising in bankruptcy proceedings' is meant those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors."

Hinds v. Moore, 14 A. B. R. 1, 134 Fed. 221 (C. C. A. Tenn.): "That this is not an appeal in one of the special cases mentioned in § 25a must be conceded. The petition of the trustee, and the answer of the defendant thereto raised a distinct and separable controversy over certain property adversely held and claimed by the defendant thereto. It may therefore be well treated as one of those 'controversies arising in bankruptcy proceedings,' over which this court may exercise general appellate jurisdiction, as in other cases under § 24a."

In *re Friend*, 13 A. B. R. 597, 134 Fed. 778 (C. C. A. Ills.): "That § 23 establishes a clear distinction between 'proceedings in bankruptcy' and 'controversies at law and in equity arising in the course of bankruptcy proceedings,' the former, broadly speaking covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate; and the latter, broadly speaking, involving questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, concerning property in the possession of the trustee or of claimants, to be litigated in appropriate plenary suits, and not affecting directly the administrative orders and judgments, but only the question of the extent of the estate.

"That the same distinction is maintained in § 24a, on the one hand, and §§ 24b and 25a on the other.

"That § 24a, gives, if the grant be necessary in view of § 6 of the Act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], this court appellate jurisdiction of controversies at law and in equity between trustees and adverse claimants, to be invoked by writ of error or by appeal, as may be appropriate."

In *re McMahon*, 17 A. B. R. 537, 147 Fed. 685 (C. C. A. Ohio): "The distinction between cases which are 'proceedings in bankruptcy' under § 24b, and those which are 'controversies arising in bankruptcy proceedings' and appealable under the general appellate jurisdiction of the court as confirmed by § 24a, is not always clear nor easily stated. Between *Hewitt v. Berlin Machine Works*

and *First National Bank of Chicago v. Chicago Title and Trust Co.*, there is this distinction: In the first case the stranger voluntarily came in and set up a claim against property in possession of the bankrupt's trustee. Very clearly that made one of those independent controversies which may arise in a bankruptcy proceeding or in any other where the res is in custodia legis, and was appealable under § 24a. In the latter case the same kind of issue arose, but it arose upon the application of the trustee for an order of sale and as incident to that the determination of a claim against the property held by one not a party to the proceeding. The latter is plainly held to be a 'proceeding in bankruptcy' not appealable, but reviewable in matters of law only upon an appeal to the supervisory powers of the Court of Appeals, under § 24b. The distinction we recognize and apply in this case by holding that the proper and only mode of correcting error in the case was through the supervisory powers of this court, and that the petitioner resorted to the right remedy, though he had no wrong to redress."

Liddon & Bro. v. Smith, 14 A. B. R. 206, 135 Fed. 43 (C. C. A. Fla.): "The words 'bankruptcy proceedings' are used in §§ 23, 24 and 25 * * * in contradistinction to controversies arising out of the settlement of the estates of bankrupts. * * * The appellants asserted title to the proceeds of the mortgaged property in the possession of the trustee by the petition they filed, and this raised a distinct and separable suit, and the controversy thereon may be treated as one of those controversies arising in bankruptcy proceedings over which the Circuit Court of Appeals can, under § 24a, exercise appellate jurisdiction as in other cases. * * * The motion to dismiss the appeal must therefore be denied, but in considering the appeal we are limited to the controversy over the right of the appellants to the proceeds of the sale of the mortgaged property, which controversy embraces, of course, the correct ascertainment of the balance due the appellants on their notes and mortgage, and the amount of the cost and charges, which have a superior rank to their claim against the proceeds of the mortgaged property."

Morehouse v. (Pacific) Hardware & Steel Co. et al., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.): "It is conceivable that the line of demarcation between 'proceedings in bankruptcy' and controversies at law and in equity, arising 'in the course of bankruptcy proceedings,' may in some cases be obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming a composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs. The order which is sought to be reviewed in the present case is one made in a proceeding for contempt. It was not made with a view to obtain possession of property of the bankrupt, or to enforce a prior order of the court, but it is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the court. Such a proceeding has nothing to do with the estate in bankruptcy. It is the exercise of the court's power to preserve order in its judicial proceedings and enforce its own order. It is a proceeding prosecuted for the benefit of the government, the courts, and the public. Section 2 (13) of the Bank-

ruptcy Act gives the Court of bankruptcy power to enforce obedience, by its officers and other persons, to all lawful orders, by fine or imprisonment, or both. But the power of a court of bankruptcy to punish for a contempt does not rest alone upon the statute."

In *re Jacobs*, 3 A. B. R. 671; 99 Fed. 539 (C. C. A. Mo.): "* * * bankruptcy proceedings strictly so-called, viz., those which are initiated by the petition and end in the distribution of assets among creditors, and the discharge or refusal of the discharge of the bankrupt."

Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.): "While the Supreme Court of the United States has not, so far as we are aware, directly decided what proceeding, if any, is appropriate to review the decision of a District Court declining to revoke a discharge, there have been numerous decisions by District Courts, Circuit Courts of Appeals and the Supreme Court of the United States, construing the several sections above quoted, and from the general trend of these decisions we make the following statement of conclusions: That there is a clear distinction between 'controversies arising in bankruptcy proceedings,' as mentioned in § 24a, and the 'proceedings in bankruptcy,' which, by § 24b, the Circuit Courts of Appeals are given jurisdiction to superintend and revise 'in matter of law;' the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as 'proceedings in bankruptcy,' and the latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily."

Similar rulings prevailed under the Bankruptcy Act of 1867.⁶

Bank v. Title & Trust Co., 14 A. B. R. 102, 198 U. S. 280: "This distinction existed under the prior bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted."

§ 2865. Thus, Adjudication of Bankruptcy, or Its Refusal, a Question "In Bankruptcy Proceedings" Proper.—Thus, the adjudication of bankruptcy of a debtor, or the refusal to adjudge him bankrupt, is a question arising in the regular course of bankruptcy proceedings, and appeal from the adjudication or refusal to adjudicate must be taken in accordance with the provisions of the act, or not at all.

It was so held in the case of *First Nat'l Bk. v. Klug*, above quoted, where the district court had refused to adjudge bankrupt a debtor, be-

6. In *re Jacobs*, 3 A. B. R. 671, 99 Fed. 539 (C. C. A. Mo.); [1867] *Smith v. Mason*, 14 Wall. 419; [1867] *Lathrop Assignee v. Drake*, 91 U. S. 516, quoted in quotation from *Bardes v. Hawarden Bank*, 4 A. B. R. 163, 173

U. S. 524; [1867] *Marshall v. Knox*, 16 Wall. 419; [1865] In *re Bonesteel*, 7 Blatchf. 175; [1867] *Knight v. Cheney*, 14 Fed. Cases 760; [1867] In *re Ballou*, 4 Ben. 135; [1867] In *re Marter*, 16 Fed. Cases 857.

cause he was a farmer, appeal being sought directly to the supreme court under § 25 (d).⁷

Also, *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.): "A proceeding in bankruptcy (here the adjudication of a debtor to be bankrupt) is a proceeding in equity and orders and decrees therein cannot be reviewed by writs of error."

§ 2865½. Likewise, Discharge.—Questions arising as to the right of the bankrupt to his discharge are not "controversies arising in bankruptcy proceedings" but are "proceedings in bankruptcy" themselves.

Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.): "Clearly this is not one of the controversies arising in proceedings in bankruptcy provided for in § 24a, as to which the appellate courts are invested with appellate jurisdiction as in other cases, for the latter by judicial definition are limited to cases of the class referred to in § 23, Bankruptcy Act, as amended. Hence it becomes apparent that the appeal to the Circuit Court of Appeals provided by said § 24a is not appropriate from an order dismissing a petition to revoke a discharge granted to the bankrupt."

§ 2866. Likewise, Allowance or Refusal of Exemptions.—The allowance or refusal of exemptions is a proceeding in bankruptcy.⁸

§ 2867. And Allowance or Rejection of Claim to Share in Dividends, or in Marshaling of Firm and Individual Estates.—The allowance or rejection of a claim for a share in the dividends, is a question arising in the regular course of bankruptcy proceedings proper.⁹

Thus, the disallowance of a claim for non surrender of a voidable preference is a step in bankruptcy proceedings proper and is appealable under § 25a.¹⁰

Again, where the question arises in the marshaling of firm and individual estates in partnership bankruptcies whether a firm debt shall also share in the individual estate of one partner who has gone surety for the debt, it is a question concerning the "allowance or rejection" of a "claim"—peculiarly one of the steps taken in the regular course of bankruptcy proceed-

7. First Nat'l Bk. of Denver *v.* Klug, 8 A. B. R., 12, 186 U. S. 202.

8. Compare post, §§ 2906, 2930. In re Youngstrom, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); *Ingram v. Wilson*, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa).

Widows' and Children's Allowance on Death of Bankrupt Pending Proceedings.—But it is doubtful whether allowance to widows and children, under § 8 on the death of the bankrupt pending the proceedings are proceedings in bankruptcy. In re McKenzie, 15 A. B. R. 680 (C. C. A. Ark.).

Bankrupt not heard as to refusal of exemptions altogether on review brought by creditor as to other matters relating to exemptions, see In re Cohn, 22 A. B. R. 761, 171 Fed. 568 (D. C. N. Dak.); also, see ante, § 111½.

9. *Tefft, Weller v. Munsuri*, 222 U. S. 114, 27 A. B. R. 338; *Holden v. Stratton*, 191 U. S. 155, 10 A. B. R. 789. [1867] Compare, *Wiswall v. Campbell*, 93 U. S. 347; [1867] compare, *Leggett v. Allen*, 110 U. S. 741.

10. *Cooper v. Miller*, 30 A. B. R. 194, 203 Fed. 383 (C. C. A. Ky.).

ings proper, and is not to be considered as a "controversy" over a right of priority.¹¹

§ 2868. Exceptions to Trustee's Reports and Allowance or Disallowance of Costs and Expenses of Administration—Such as Attorneys' Fees.—And orders of allowance or disallowance of costs and expenses of administration—such as trustee's attorney's fees—are proceedings in bankruptcy.¹²

So, likewise, are orders sustaining or overruling exceptions to trustee's reports.¹³ So, likewise, is the reimbursement of creditors for attorneys' fees and other expenses incurred in recovering assets for the benefit of the estate under § 64 (b).¹⁴

The rejection of charges against a receiver in bankruptcy for expenses incurred for the preservation of the estate is discretionary with the bankruptcy court, and no appeal lies therefrom under the act,¹⁵ but this is not because it is not a proceedings in bankruptcy proper.^{15a}

§ 2869. Even Validity and Priority of Lien May Be, if Incident to Allowance or Rejection of Creditor's Claim for Share in Dividends.

—And thus, even the validity, extent and priority of a lien on the bankrupt's property may be a question arising in the course of bankruptcy proceedings proper, and hence determinable upon appeal, under § 25 (a), if the lien is incident to a debt owing by the bankrupt which is in controversy.¹⁶

Hutchinson v. Otis, 190 U. S. 552, 10 A. B. R. 135: "A petition was filed * * * asserting a lien on the proceeds of a seat in the New York Stock Ex-

11. *In re Mueller*, Trustee, 14 A. B. R. 259, 135 Fed. 711 (C. C. A. Ky.).

12. See post, § 2933; *Davidson & Co. v. Friedman*, 15 A. B. R. 490, 140 Fed. 853 (C. C. A. Ohio).

Assignees' Lien Not "Bankruptcy Proceedings," but "Controversy."—The allowance of compensation and expenses to an assignee, upon the turning over of the assigned property to the bankruptcy trustee, is not a "proceedings in bankruptcy" but rather a "controversy arising in bankruptcy." *In re Levitt*, 11 A. B. R. 411 (D. C. Wis.). But compare practice in *Randolph v. Scruggs*, 10 A. B. R. 1, 190 U. S. 533, which came up on appeal as a "claim" in "excess of \$500."

Decree directing bankrupt's attorney to account for sum paid him by bankrupt before bankruptcy held to be a "controversy" and appealable under § 24 (a). *Haffenberg v. Chicago Title & Trust Co.*, 27 A. B. R. 708, 192 Fed. 874 (C. C. A. Ill.).

13. *Bank of Clinton v. Kondert*, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.). Compare, post, § 2932.

14. *Ohio Valley Bank Co. v. Switzer*,

18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio).

15. *O'Brien v. Ely*, 28 A. B. R. 247, 195 Fed. 64 (C. C. A. Ala.).

15a. Compare, § 2928.

16. *Liddon & Bro. v. Smith*, 14 A. B. R. 206, 135 Fed. 43 (C. C. A. Fla.), quoted at § 2864; *In re Loving*, 224 U. S. 183, 27 A. B. R. 852; *Century Savings Bk. v. Moody*, 31 A. B. R. 586, 209 Fed. 775 (C. C. A. Iowa); *Snow v. Dalton*, 29 A. B. R. 240, 203 Fed. 843 (C. C. A. N. Car.); [indeed, this case goes too far, because the debt was not controverted at all], *In re Streator Metal Stamping Co.*, 30 A. B. R. 55, 205 Fed. 280 (C. C. A. Ills.); *Bank v. Title and Trust Co.*, 14 A. B. R. 102, 198 U. S. 280, is not contra, see *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223.

Apparent instance, *In re Antigo Screen Door Co.*, 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis.), wherein the facts would permit of the holding therein made, but the reasoning of the court is out of harmony with the great weight of authority. See analogously, post, § 2901.

change, which formerly belonged to the bankrupt. * * * The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in court, and is not a proceeding in bankruptcy. Under the circumstances of this case it seems to us that the petition was incident to the claim (*Cunningham v. German Ins. Bank*, 4 Am. B. R. 192, 101 Fed. 977), and was a bankruptcy proceeding under § 2, cl. 7, within the meaning of § 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not 'a judgment allowing or rejecting a debt or claim of five hundred dollars or over,' within § 25a, 3, and was not an independent ground of appeal."

Cunningham v. Bank, 4 A. B. R. 192, 101 Fed. 977 (C. C. A. Ky.): "This motion is based upon a suggestion that an appeal will not lie to this court from a judgment denying or allowing a lien or preference out of the bankrupt's estate, but that such a judgment can only be questioned by petition invoking the power conferred upon the court by the 24th section of the Bankruptcy Act of 1898. The appellate jurisdiction of this court in bankruptcy proceedings is defined by the 25th section of the Bankruptcy Act. * * *

"Learned counsel say that a review of a judgment allowing or disallowing the lien of a debt or claim can only be had under the superintending and reviewing powers of this court granted by the 24th section, and that an appeal will not lie from such a judgment. If this be true, such a judgment can be reviewed only upon matters of law, and when the lien allowed or denied depends upon a controverted question of fact and law, no review of the judgment is possible, inasmuch as the remedy afforded by the 24th section is limited to matters of law.

"To this construction of the act we cannot assent.

"The appeal from a judgment allowing or rejecting a debt or claim includes as an incident any question as to the rank or lien of such debt or claim in the distribution of the bankrupt's estate. If the debt or claim including its lien or preference depend upon controverted questions of fact and law, the right of appeal is granted by the 25th section, above set out."

Thus, where a secured creditor voluntarily presents a proof of debt, asserting his lien on property in the custody of the bankruptcy court, and the trustee objects to the same on the ground that the security was acquired by a fraudulent transfer it is so appealable, as a proceedings in bankruptcy proper.

Coder v. Arts, 213 U. S. 223, 22 A. B. R. 1: "The answer to this question depends upon an examination of the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustees to be administered, described the mortgage as being the only security held by him for the payment of the debt, and concluded his claims with this statement: 'The deponent, in filing his claim herein against the bankrupt, does so with the express understanding that he makes no waiver of any portion of his security, and expressly reserves said security and every portion thereof to the amount of said claim, including the costs, if any, of collecting payment thereof out of said property held as security.' He thus in effect presented to the trustee in bankruptcy a claim upon his notes, joined with the statement that he had security upon the estate which

it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. He did not, as was the case in *Hewitt v. Berlin Mach. Works*, supra; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, * * * *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, * * * intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court, recognizing the title and possessing of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the Bankruptcy Act governing bankruptcy proceedings. It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee. This method of procedure was recognized in *Hutchinson v. Otis*, 190 U. S. 552."

And where the trustee has been objecting to both the claim and lien, but, after allowance of the claim, ceases his objections to the claim and simply continues to contest the lien, the character of the proceeding is not changed: they continue to be proceedings in bankruptcy appealable only under § 25 (a).

In *re Loving*, 224 U. S. 183, 27 A. B. R. 852: "Section 25 provides for appeals and writs of error in bankruptcy proceedings to the Circuit Court of Appeals and to this court. These sections [24 and 25] of the Bankruptcy Act were under consideration in this court in the case of *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1, and it was there held that controversies arising in bankruptcy proceedings, as distinguished from bankruptcy proceedings, were appealable to the Circuit Court of Appeals under the Court of Appeals Act of March 3, 1891; that where a claim alleged to be secured by a lien upon the bankrupt's estate was filed against a bankrupt for allowance, an appeal was given under § 25a to the Circuit Court of Appeals, as from a judgment allowing or rejecting a claim of \$500 or over, and that from any final decision of the Circuit Court of Appeals allowing or rejecting a claim coming within § 25b, a further appeal was given to this court. Under the decision of this court in that case there can be no doubt that the bank in this case instituted a proceeding in bankruptcy, which was appealable under § 25a to the Circuit Court of Appeals. The fact that after the adjudication of the claim the trustee made no objection to its allowance as a valid claim, but intended only to contest its validity as a lien upon the bankrupt's estate, made no difference as to the appellate character of the controversy. A bankruptcy proceeding was instituted as to the claim and its alleged lien, as distinguished from a controversy arising in a bankruptcy proceeding, and the appeal was under § 25a to the Circuit Court of Appeals."

§ 2870. But if Sole Controversy Is About Lien or Priority, None About Debt, Not a Question "in Bankruptcy Proceedings" Proper.
—But if the sole controversy is about the lien and not about the debt, it is

not a proceedings in bankruptcy proper, but is a controversy arising out of a bankruptcy proceedings.¹⁷

Schuler v. Hassinger, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.): "It is true that in the order of sale the referee recognizes and adjudicates the validity and amount due on the several mortgages upon the property of the Southern Steel Company as incidental to the necessary sale of the property free and clear of all incumbrances; but it is doubtful if such recognition was such an allowance of a claim as would entitle any party not adversely affected to appeal therefrom. * * * And it may be said, further, that, if any one of the appeals now before us could be maintained on the ground that it was taken from an order allowing a claim, then only the validity of the claim allowed could be considered, and there is no evidence in the record attacking the validity of the claims adjudicated by the referee, but all tends to establish them. It follows that the appeals in this case must be dismissed."

Yet the character of the proceedings in this regard must be determined by the nature of the claim set up against the trustee in bankruptcy and not by the mere incident of the questions controverted or conceded in argument.¹⁸

§ 2871. And Claim Controverted Must Be Creditor's Claim, Else Not.—And the validity, extent or priority of a lien on the bankrupt's property, where the lienholder is not also a creditor of the bankrupt, are not questions arising in bankruptcy proceedings proper, but are "controversies" arising out of bankruptcy proceedings.¹⁹

17. *Hutchinson v. Otis*, 10 A. B. R. 138, 190 U. S. 552 (affirming S. C.), 10 A. B. R. 275, 123 Fed. 14), quoted ante, § 2869, and post, § 2902.

In *re Rouse, Hazard & Co.*, 1 A. B. R. 239, 91 Fed. 96 (C. C. A. Ill.), quoted post, § 2902.

In *re Doran* (*Moorman v. Beard*), 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); In *re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.); also compare, *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223; *Century Savings Bk. v. Moody*, 31 A. B. R. 586, 209 Fed. 775 (C. C. A. Iowa); *Rode & Horn v. Phipps*, 27 A. B. R. 827, 195 Fed. 414 (C. C. A. Tenn.); In *re Standard Tel. & Elec. Co.* (*Knapp v. Milw. Tr. Co.*), 24 A. B. R. 761, 216 U. S. 545 affirming *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675), quoted at § 2875, and on other points at § 2969. Contra, In *re Streater Metal Stamping Co.*, 30 A. B. R. 55, 205 Fed. 280 (C. C. A. Ills.). See post, §§ 2902 and 2936. Compare instances under § 2875, post. And compare apparently contra, *Bank v. Title and Trust Co.*, 14 A. B. R. 102, 198 U. S. 280, quoted ante, § 2864.

And compare, also apparently contra, *O'Dell v. Boyden*, 17 A. B. R. 759 (C.

C. A. Ohio): "In the case at bar the proceeding was instituted by the trustee's petition to bring in O'Dell to adjudicate his claim or lien against property alleged to be in custodia legis. That was the ground of the jurisdiction in the case of *First Nat'l Bank of Chicago v. Chicago Title and Trust Co.*, and In *re McMahon*. In both cases the facts made a 'proceeding in bankruptcy' reviewable only in matter of law under 24b. These cases govern this. So, too, the case is distinguishable in this respect from *Loeser, Trustee, v. Savings Deposit Bank & Trust Co.*, 17 A. B. R. 628, decided with the present case. In the case last mentioned, the res was voluntarily surrendered to the bankrupt's trustee by a mortgagee in possession who came in and prosecuted his claim to a lien under a mortgage covering the property thus brought in by him. The appeal must be dismissed as no appeal will lie under § 7 of the Court of Appeals Act of 1891 from an injunction awarded in course of such a proceeding."

18. *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1; In *re Loving*, 224 U. S. 183, 27 A. B. R. 852, quoted at §§ 2869, 2887.

19. See analogously, post, § 2900.

Burleigh v. Foreman, 11 A. B. R. 76, 125 Fed. 217 (C. C. A. Mass.): "When, however, the equity courts assume a jurisdiction of that character, it is a fundamental rule, so far as the Federal tribunals are concerned, that, whenever any party intervening raises a distinct and separable issue or controversy involving substantial pecuniary rights, an appeal lies. Pursuing that analogy, an appeal should be allowed in the present case. A construction of the Bankruptcy Act of 1898 which would lead to a different conclusion would be monstrous. It would give a single judge absolute power over questions of fact concerning estates in bankruptcy, no matter how immense, while no such power exists in any other branch of the Federal judicial jurisdiction. Such a result should not be accepted unless the statute furnishes some express provision in that direction, clear and positive. None such exists.

"The relief given by the Bankruptcy Act of 1898 to litigants dissatisfied with the conclusions of the District Court are distinctly threefold: First, there is an appeal provided in § 25, with reference to the specific matters named therein. This was needed if an appeal was to be allowed, as the matters to which it relates could arise in bankruptcy only. Second, § 24b gives the several Circuit Courts of Appeals jurisdiction 'to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.' Third, § 24a invests them 'with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.' * * *

"The subject-matter of this appeal is not in any way peculiar to bankruptcy. Questions of marshaling assets between a copartnership and individual partners arise at common law, but oftener at equity. In the present case the controversy is governed entirely by the principles of the common law and the rules of equity, and it is, therefore, for the reasons we have given, of an essentially different class from the matters as to which § 25a allows appeals. It is involved in the present 'bankruptcy proceedings' simply because it arose in them, within the meaning of the citation already made from § 24a of the statute of 1898. The question involved is not, in any proper sense of the word, a mere proceedings in bankruptcy; and there is no reason, either in the theory of the law or in the express language of the statute, why relief should be limited to that kind which is afforded only with reference to such proceedings."

§ 2872. Seizures on Warrants to Marshal, Proceedings in Bankruptcy.—And questions arising out of the seizure of property by a receiver or marshal, being under the special provisions of the Bankruptcy Act, are proceedings in bankruptcy proper, and not mere "controversies."²⁰

§ 2873. Trustee's Petitions for Summary Surrender of Property.—And a petition by the trustee for an order upon a third party, to surrender property in his possession belonging to the estate, is a "controversy arising" out of a bankruptcy proceedings, and is not a part of the bankruptcy proceedings proper;²¹ even where the property has previously been

²⁰. In *re Moody*, 12 A. B. R. 718, 131 Fed. 525 (D. C. Iowa).

²¹. *Hinds v. Moore*, 14 A. B. R. 1, 134 Fed. 221 (C. C. A. Tenn.); In *re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa); In *re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.).

But compare, In *re Farrell*, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio). Contra, obiter, *Morehouse v. (Pacific) Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.), quoted at § 2879½.

voluntarily surrendered by the bankruptcy receiver through the third party's persuasion;²² although it has been held that a summary order on a non-bankrupt member of a bankrupt firm to surrender a policy of insurance is a step in bankruptcy proceedings proper.²³

But orders on the bankrupt or his voluntary assignee to surrender property of the estate are "proceedings" and reviewable by petition to revise under § 24 (b).²⁴

§ 2874. Trustee's Plenary Suits in U. S. District Court to Recover Property Fraudulently or Preferentially Transferred, Not Bankruptcy Proceedings Proper.—Likewise, a suit in equity brought by a trustee in bankruptcy in the U. S. District Court, under § 67 (e), § 70 (e) or § 60 (b) as amended in 1903, (or "by consent") to recover property adversely held, but alleged by the trustee to belong to the bankrupt's estate, and to have been fraudulently or preferentially transferred or otherwise recoverable by the trustee, is an independent suit, incapable of being characterized as a proceeding in bankruptcy within the meaning of § 24 (b), but is a "controversy arising" in a bankruptcy proceeding.²⁵

In *re Jacobs*, 3 A. B. R. 675, 99 Fed. 539 (C. C. A. Mo.): "In view of these adjudications upon the Bankrupt Act of 1867, we feel constrained to hold that it is only some action taken or order made in the bankruptcy proceeding itself which can be reviewed by an original petition addressed to this court, under subdivision 'b' of § 24 of the Bankrupt Act, and that the power thereby conferred 'to superintend and revise' the action of the District Court does not extend to suits brought in that court by the trustee in bankruptcy against third parties, to collect the assets of the estate, or to suits brought by third parties against the trustee, whether such suits are rightfully or wrongfully brought in that court, as to which point we express no opinion at this time. Such suits as those last referred to, whether at law or in equity, are not proceedings in bankruptcy, or 'controversies arising in bankruptcy proceedings,' within the meaning and intent of the law authorizing petitions for review, but they are suits

²². *Hinds v. Moore*, 14 A. B. R. 1, 134 Fed. 221 (C. C. A. Tenn.).

²³. In *re Mertens*, 15 A. B. R. 701, 142 Fed. 445 (C. C. A. N. Y.); *Fisher v. Cushman*, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Mass.).

²⁴. See post, § 2938. *Morehouse v. Hdw. Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.); impliedly, *Schweer v. Brown*, 195 U. S. 171, 12 A. B. R. 673.

²⁵. See post, § 2927. *Doroshov v. Ott*, 14 A. B. R. 34, 134 Fed. 740 (C. C. A. N. J.); *Delta Nat'l Bk. v. Easterbrook*, 13 A. B. R. 338, 133 Fed. 521 (C. C. A. Tex.), which was a suit at law to recover property preferentially transferred. *McCarty v. Coffin*, 18 A. B. R. 148, 150 Fed. 307 (C. C. A. Tex.).

Dolle v. Cassell, 14 A. B. R. 52, 135 Fed. 52 (reversed, on other grounds, sub nom. *York Mfg. Co. v. Cassell*), wherein a vendor under a conditional

sale of chattels sought to recover the articles under an unrecorded agreement for the retention of title until payment of the purchase price.

In *re First Nat'l Bk. of Canton*, 14 A. B. R. 180, 135 Fed. 62 (C. C. A. Ohio), in which a creditor of the bankrupt sought to enforce a mortgage lien upon a stock of merchandise belonging to the bankrupt, which stock had come to the possession of the bankrupt's trustee.

Compare, *Stelling v. Jones Lumber Co.*, 8 A. B. R. 521, 116 Fed. 261 (C. C. A. Wis.). Also compare, *Walter Scott v. Wilson*, 8 A. B. R. 349, 115 Fed. 284 (C. C. A. Ills.); *Kirkpatrick v. Harnesberger*, 29 A. B. R. 439, 199 Fed. 886 (C. C. A. Ga.); *Haffenberg v. Chicago Title & Trust Co.*, 27 A. B. R. 708, 192 Fed. 874 (C. C. A. Ills.); *Barnes v. Pampel*, 27 A. B. R. 192, 192 Fed. 525 (C. C. A. Ohio).

which must be reviewed in the ordinary way, by appeal or writ of error, when they have reached a final determination in the court of first instance. We can discover nothing in the language or policy of the recent Bankruptcy Act which would seem to require the various Circuit Courts of Appeals to review every interlocutory order made or proceeding taken, in an ordinary action at law or in equity, in a suit between a trustee in bankruptcy and a third party, which happens to be brought in the District Court, simply because the trustee's title to the property claimed, or his liability to be sued, is founded on the Bankrupt Act. Nor do we believe that such a construction of the act was within the contemplation of Congress."

Westall v. Avery, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. Car.): "* * * It is also well settled that a proceeding instituted by a bankrupt's trustee to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy."

McNulty v. Feingold, 12 A. B. R. 339, 129 Fed. 1001 (D. C. Pa.): "The parties here have been adjudged bankrupts, a trustee appointed, and suit is instituted by him against third parties for the value of property fraudulently conveyed to them by the bankrupt. It is therefore a controversy at law or in equity, within the provision of § 23, and not a proceeding in bankruptcy, wherein summary proceeding can be had."

Question arising out of the seizure of property by a receiver or marshal under the special provisions of the bankruptcy act, are proceedings in bankruptcy and not mere "controversies." ²⁶

§ 2875. Nor Are Intervening Petitions Claiming Property in Custody of Bankruptcy Court or Liens Thereon.—Intervening petitions of third parties claiming property or interests in property in the custody of the bankruptcy court are not "bankruptcy proceedings" proper, but are "controversies arising in bankruptcy." ²⁷

In re Standard Tel. & Elec. Co., 216 U. S. 545, 24 A. B. R. 761 (affirming *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675): "The trustee in bankruptcy filed a petition to sell all the property of the bankrupt appellant *Knapp*, as

²⁶. *In re Moody*, 12 A. B. R. 718, 131 Fed. 525 (D. C. Iowa). See ante, § 2872.

²⁷. *Liddon & Bro. v. Smith*, 14 A. B. R. 204 (C. C. A. Fla.), quoted ante, § 2864; *In re Holmes*, 15 A. B. R. 689 (C. C. A. Colo.); *Hutchinson v. LeRoy*, 8 A. B. R. 20 (C. C. A. Mass.); Intervening petition following trust funds. Apparently, *Smith v. Evans*, 17 A. B. R. 433 (C. C. A. Ills.).

But compare, *In re Antigo Screen door Co.*, 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis.): This case is defensible only on the theory that the validity of the lien therein adjudicated was an incident to the determination of the validity of a debt and hence was appealable. The opinion, however, does not rest the case on this basis.

Also, apparently contra, *O'Dell v. Boyden*, 17 A. B. R. 759 (C. C. A. Ohio), quoted ante, § 2870, note.

Claiming lien on property, *In re Doran*, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); instance (but point not adverted to) *Franklin v. Stoughton Wagon Co.*, 22 A. B. R. 63, 168 Fed. 857 (C. C. A. Okla.); *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.).

In re Gold, 31 A. B. R. 18, 210 Fed. 410 (C. C. A. Ill.); *Century Savings Bk. v. Moody*, 31 A. B. R. 586, 209 Fed. 775 (C. C. A. Iowa); *In re Martin*, 29 A. B. R. 935, 201 Fed. 31 (C. C. A. Ky.).

Reclaiming goods bought by bankrupt through misrepresentation. *In re Gold*, 31 A. B. R. 18, 210 Fed. 410 (C. C. A. Ills.).

Intervening petition for reclamation by conditional vendor. *Baker Ice Machine Co. v. Bailey*, 31 A. B. R. 513 (C. C. A. Kan.).

trustee of certain mortgages given by the telephone company, intervened and asked to have the lien of the mortgages established as a first lien on the property and satisfied out of the proceeds of the sale. The property was sold, and the question is as to the lien of these mortgages upon the fund. * * * The case at bar * * * is an intervention in a bankruptcy proceeding and, within the meaning of the Act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the Court of Appeals Act." Quoted on other points at § 2969; and on matters of substantive law at § 1207¼ and § 1258.

Hewitt v. Berlin Machine Co., 11 A. B. R. 711, 194 U. S. 296 (discussed in *In re McMahon*, 17 A. B. R. 536): "And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under § 24a, exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (*Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786), while § 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by § 2, to settle the estates of bankrupts, and to determine controversies in relation thereto *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135 *Burleigh v. Foreman*, 125 Fed. 217. The appeal to this court then followed, under § 6 of the Act of March 3, 1897."

Loeser v. Bank & Trust Co., 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio): "But we made no mistake in treating the case as properly here by an appeal under the general appellate jurisdiction of this court. The case presented a 'controversy' arising in bankruptcy. It involved the claim of the bank under a chattel mortgage to assets in the possession of the bankrupt's trustee. The bankrupt court, under the broad powers conferred by § 2 of the Bankruptcy Act, had the power to determine controversies relating to the estate of the bankrupt in its possession, whether the controversy related to the title or to liens thereon or rights therein. The property here involved had been surrendered by the bank to the trustee, the bank reserving its rights against the proceeds of sale. Having the actual possession, it mattered nothing whether the trustee instituted a proceeding to bring the bank in for the determination of the controversy, or whether the bank had intervened by petition to assert its rights."

Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.): "The claim of the appellant * * * was brought to the attention of the court of bankruptcy by a verified statement of the mortgagee which set forth his mortgage, the claim it secured and the specific property upon which he claimed a lien under it. The issue it presented was whether or not the mortgage, which was valid between the parties, was voidable by the trustee. That issue was separate and distinct from the general subject matter of the proceedings in bankruptcy, and it presented a controversy of which the Circuit Court of Appeals would have had jurisdiction if it had arisen in any other case in a Federal court. The conclusion is that the Circuit Courts of Appeal have jurisdiction to review the final decisions by the courts of bankruptcy of controversies arising between the trustees in bankruptcy and third parties over the title to, or over the liens upon the alleged property of the bankrupt or its proceeds under § 24a; that this jurisdiction is not excluded or revoked by the grant of appellate jurisdiction over the three classes of cases specified in § 25 (a), but the effect of that section is to limit the time within which appeals may be taken in the cases there treated, and to increase

to some extent the appellate jurisdiction of the Courts of Appeals; that the general appellate jurisdiction vested by § 24a is not impaired or affected by the grant of the power of revision and supervision in matter of law contained in § 24b; and that the motion to dismiss this appeal must be denied."

And compare, apparently, but not really, contra, *In re Drayton*, 13 A. B. R. 602 (D. C. Wis.): " * * * settlement of title to or claims against specific property in the hands of the trustee, as purported assets of the estate, is one of the 'proceedings in bankruptcy' mentioned in § 23 of the Act as there distinguished from separate 'controversies at law and in equity' between 'trustees, as such, and adverse claimants,' concerning the property acquired or claimed by the trustees. The property or proceeds in question in the present case is in the hands of the trustee, in custodia legis, and the Bankruptcy Court is necessarily vested with both power and duty to determine all rights therein, upon proper notice, as 'controversies in relation thereto,' vide, § 2, subd. 7, of the Act; no inconsistent provision appearing elsewhere."

Likewise independent plenary suits in the nature of equitable replevin instituted by adverse claimants to recover property from the custody of the bankruptcy court are not "proceedings in bankruptcy" proper but are "controversies arising in bankruptcy."²⁸

Also, independent plenary suits brought in the United States District Court by adverse claimants in possession to enjoin trustees or receivers, are "controversies" and not "bankruptcy proceedings" proper.²⁹

§ 2876. But Orders of Sale and Controversies Incident Thereto, Proceedings in Bankruptcy Proper and Not "Controversies."—But orders of sale and controversies incident thereto are proceedings in bankruptcy proper, and not "controversies arising in bankruptcy proceedings;" and are therefore not appealable (because not within § 25a), but reviewable only under 24 (b).³⁰

Schuler v. Hassinger, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.): "The proceedings in the District Court in the bankruptcy of the Southern Steel Company, which are attacked in the several appeals, to wit, the sale and disposition of the bankrupt's effects, are regular steps or proceedings in bankruptcy, and no appeal lies from orders or decrees in such proceedings. See *Remington on Bankruptcy*, 1678, § 2864, for a full discussion."

Nevertheless a proceedings to compel a purchaser at a judicial sale by the receiver in bankruptcy to carry out his offer of purchase has been held to be a "controversy arising in bankruptcy proceedings" and to be appealable as such.

In re Jungmann, 26 A. B. R. 401, 186 Fed. 302 (C. C. A. N. Y.): "If the

²⁸. *Walter Scott v. Wilson*, 8 A. B. R. 349, 115 Fed. 284 (C. C. A. Ills.).

²⁹. *Warehousing Co. v. Hand*, 16 A. B. R. 56, 143 Fed. 32 (C. C. A. Wis.). See post, §§ 2926, 2937 and 2943.

³⁰. *Bk. v. Chicago Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280; *O'Dell*

v. Boyden, 17 A. B. R. 759, 150 Fed. 731 (C. C. A. Ohio), quoted ante, § 2870, note. Obiter, *In re McMahon*, 17 A. B. R. 537, 147 Fed. 685 (C. C. A. Ohio); obiter, *Mason v. Wolkowich*, 17 A. B. R. 717, 150 Fed. 699 (C. C. A. Mass.).

question were whether or not the bankruptcy court should have directed the sale of the bankrupt's property at some particular time, or in some particular manner—at auction or at private sale—or to some particular individual, or for some particular price, we would have a proceeding in bankruptcy, pure and simple. But in this case substantially the only question raised is whether or not a contract of purchase was ever made. This would certainly seem to be a 'controversy in a bankruptcy proceeding' arising between the receiver and an outside person; the former insisting that the latter made a contract with him, and the latter strenuously denying that any such contract was made. Such a controversy would be justiciable in other courts. The receiver might, if he chose to do so, bring suit in a State court or in the Circuit Court provided there was the requisite diversity of citizenship, alleging the making of the contract and asking damages for an alleged breach of it. Since that is the kind of controversy which has arisen in this bankruptcy proceeding, its decision by the district judge is reviewable by appeal."

§ 2877. Unless Real Controversy Not about Order of Sale nor Claim but about Lien or Title Itself.—But here again, if the real controversy is not about the order of sale or about the debt but rather about other matters connected therewith, such as the extent or validity of a lien or the right of property itself, it is a "controversy" and not a bankruptcy proceedings proper, and is appealable under § 24 (a),³¹ under the doctrine of § 2870, ante.

§ 2878. Thus, Trustee's Petition to Marshal Liens on Property in His Custody and to Enjoin Interference Not "Proceedings in Bankruptcy," but "Controversy."—Thus, a petition by the trustee to marshal liens upon property in his custody which is about to be sold, is not a "proceedings in bankruptcy" but is a "controversy," arising in bankruptcy.³²

§ 2879. Marshaling of Firm and Individual Assets and Debts in Partnership Bankruptcies.—It appears to be the holding that the marshaling of firm and individual assets in partnership bankruptcies is a "con-

³¹ *Mason v. Wolkowich*, 17 A. B. R. 17, 150 Fed. 699 (C. C. A. Mass.); *In re Doran (Moorman v. Beard)* 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.); *In re Standard Tel. & Elec. Co. (Knapp v. Milw. Tr. Co.)*, 24 A. B. R. 761, 216 U. S. 545, affirming *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675, quoted at § 2875, and on other points at § 2969. *Contra*, *In re Streater Metal Stamping Co.*, 30 A. B. R. 55, 205 Fed. 280 (C. C. A. Ills.).

³² *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio), quoted at § 2875; *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.); *In re Standard Tel. & Elec. Co.*, 24 A. B. R. 761, 216 U. S. 545, af-

firming *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675, quoted at § 2875, and on other points at § 2969.

Compare, apparently to this effect (though actual custody denied), *Stelling v. Jones Lumber Co.*, 8 A. B. R. 521, 116 Fed. 261 (C. C. A. Wis.).

Orders to Show Cause.—An order to show cause is but the means prescribed by law for bringing the defendant into court to answer the plaintiff's demands. It is in the nature of process, and, even in jurisdictions where interlocutory orders are made appealable if they affect substantial rights, it is held that an order to show cause is not of that nature. *Morehouse v. (Pacific) Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

troverſy" and not a ſtep in bankruptcy proceedings proper,³⁴ while the right of a creditor to ſhare in the firm aſſets or in thoſe of a partner, is a queſtion in "bankruptcy proceedings," being in fact concerning the "allowance" or "rejection" of a "claim."³⁵ Thus, if the controverſy is whether a claim is allowable againſt the firm alone or alſo againſt a partner's individual eſtate, where the partner had gone ſurety for the firm, the real controverſy is not concerning priority, etc., but is concerning the "allowance or rejection" of a claim, peculiarly a ſtep in bankruptcy proceedings proper.³⁶

Similarly, a ſummary order on a nonbankrupt member of a bankrupt partnership to ſurrender a policy of inſurance, has been held to be a ſtep in bankruptcy proceedings proper.³⁷

§ 2879½. **Contempt Proceedings.**—Contempt proceedings are divided into two claſſes; civil and criminal. The former is remedial in its nature and intended to coerce the defendant to perform that to which the court has found the oppoſite party entitled, and is proſecuted for the benefit of private parties, whiſt the latter is treated as a reſiſtance to the court and is proſecuted to preſerve the power and to vindicate the dignity of the court.³⁸

Maniſteſtly, a criminal contempt which is between the government and the defendant, even though connected with the bankruptcy, is not a "proceeding in bankruptcy" proper, but is a "controverſy ariſing out of the adminiſtration of the bankrupt eſtate."

Morehouſe v. Hardware Co., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.): "It is conceivable that the line of demarcation between 'proceeding in bankruptcy' and controverſies at law and in equity ariſing 'in the courſe of bankruptcy proceedings,' may in ſome caſes be obſcure; but, generally ſpeaking, the former include all queſtions ariſing in the adminiſtration of the bankrupt's eſtate, ſuch as the appointment of receivers and truſtees, orders requiring the bankrupt to ſurrender property of the eſtate in bankruptcy, orders requiring the bankrupt's voluntary aſſignee to ſurrender property of the eſtate, orders giving priority to the claim of a creditor, orders directing a ſet-off of mutual debts and orders confirming the compoſition. Theſe are queſtions which, with a view to the prompt adminiſtration and diſtribution of the aſſets of the bankrupt, the law permits to be ſummarily diſpoſed of by reviſion. The latter include all controverſies and queſtions ariſing between the truſtee and adverſe claimants of property as property of the eſtate, whether the property be in his poſſeſſion or theirs. The order which is ſought to be reviewed in the preſent caſe is one made in a proceeding for contempt. It was not made with a view to obtain poſſeſſion of property of the bankrupt, or to enforce a prior order of the court, but it is a criminal proceeding to puniſh by fine or impris-

34. *Burleigh v. Foreman*, 11 A. B. R. 74, 125 Fed. 317 (C. C. A. Maſſ.).

35. *In re Mueller, Tr.*, 14 A. B. R. 256, 135 Fed. 711 (C. C. A. Ky.).

36. *In re Mueller, Tr.*, 14 A. B. R. 256, 135 Fed. 711 (C. C. A. Ky.).

37. *In re Mertens*, 15 A. B. R. 701,

142 Fed. 445 (C. C. A. N. Y.); *Fisher v. Cuſhman*, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Maſſ.).

38. Compare ante, § 2030½, "Diſtinction between Civil and Criminal Contempt;" *Clay v. Waters*, 24 A. B. R. 293, 178 Fed. 385 (C. C. A. Mo.).

onment those who have been guilty of violating an injunction of the court. Such a proceeding has nothing to do with the estate in bankruptcy. It is the exercise of the court's power to preserve order in its judicial proceedings and enforce its own orders. It is a proceeding prosecuted for the benefit of the government, the courts, and the public."

Such a proceeding by the government to punish a defendant for a criminal contempt is entirely separate and distinct from that in which it arose and is reviewable only by writ of error.³⁹

On the other hand, a civil contempt not being separate and distinct from the proceeding in which it arises, may be either a "proceedings" or a "controversy" according to the purpose of the commitment, whether made to enforce one of the ordinary steps in bankruptcy, or to enforce some decree or order made in a controversy arising out of the administration of the estate.

Thus, an order of the bankruptcy court ordering the bankrupt to turn over property of the estate and committing him to prison until he does so, is a "proceedings" in bankruptcy, and a petition to revise is the proper method of review.

Kirsner v. Taliaferro, 29 A. B. R. 832, 202 Fed. 51 (C. C. A. Va.): "We are therefore of opinion, as well upon reason as upon authority, that an order of the court of bankruptcy ordering the bankrupt to turn over to his trustees property of the estate and committing him to prison until he does so is an order made in a proceeding in bankruptcy and may be brought before the Circuit Court of Appeals by a petition to superintendent and revise in matter of law under § 24b. It follows that it may not be brought up by appeal under § 24a."

On the other hand, a judgment against a party for a civil contempt in an independent suit in equity would be a judgment in a "controversy" and would be appealable. This is necessarily so, because in a civil contempt, the contempt proceedings is not separate and distinct as in a criminal contempt, but is a part and parcel of the proceedings out of which it arises, and its character, therefore, naturally depends upon the character of the main proceedings.⁴⁰

§ 2879½. Confirmation of Composition.—Questions arising on the confirmation of compositions are "proceedings in bankruptcy" proper, and not "controversies."⁴¹

39. *Clay v. Waters*, 24 A. B. R. 293, 178 Fed. 385 (C. C. A. Mo.); *Morehouse v. Hardware Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.); *Bessette v. Conkey*, 194 U. S. 324.

40. Inferentially, *Clay v. Waters*, 24 A. B. R. 293, 178 Fed. 385 (C. C. A. Mo.); inferentially, *Morehouse v. Hardware Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.); inferentially.

Kirsner v. Taliaferro, 29 A. B. R. 832, 202 Fed. 51 (C. C. A. Va.). Compare *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.).

41. *In re Friend*, 13 A. B. R. 595; *obiter*, *Morehouse v. Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.), quoted, on other points, at § 2879¼. Compare post, § 2896, et seq.

§ 2880. When to Appeal, When to Petition for Revision or Writ of Error.—The character of the proceedings is the determining factor in arriving at the proper method of review in the Circuit Court of Appeals. Generally, “controversies arising out of the settlement of estates of bankrupts” as distinguished from “bankruptcy proceedings” proper are to be brought up for review, either by appeal or writ of error, depending upon whether they are in the nature of suits in equity or actions at law, whilst “bankruptcy proceedings” are to be reviewed either by petition to revise in matters of law only, or by appeal where that method is specifically provided for in the statute, except that in a “proceedings” where a jury trial is demanded under the statute, a writ of error is the proper method. This subject of appellate jurisdiction in the circuit court of appeals is governed by §§ 24 (a) 24 (b) and 25 (a) of the Bankruptcy law, and is discussed later.

The following might seem to be a correct statement of the distinctions between §§ 24 (a), 24 (b) and 25 (a) :

Appeal under § 25 (a) is the method, and the exclusive method, for reviewing adjudications of bankruptcy (except as to questions determined by a jury demanded under the special provisions of the act, which are to be reviewed by writ of error) discharge, and the allowance or rejection of claims, and this is so whether or not the facts be undisputed or found. No other “bankruptcy proceedings” proper are appealable.

Section 24 (b) is the method and the only method for reviewing other “proceedings” in bankruptcy proper, and is to be used only where the facts are found or undisputed, being the method for reviewing matters of law only. Such review is to be had by petition for review and upon notice.

Section 24 (a) is the method, and [by the better rule] the exclusive method, for reviewing “controversies” arising out of bankruptcy proceedings and is exercisable in the same cases and in the same manner as in ordinary cases in the federal courts not arising out of bankruptcies. Such review is to be had, under the general provisions of the law of 1891, by writ of error in law cases, or by appeal in equity cases.

It has been definitely decided that an appeal is the exclusive method of obtaining review in “bankruptcy proceedings proper” in the cases where the statute expressly permits appeals under § 25 (a) and that in such cases a petition to revise under § 24 (b) will not lie, this being so whether or not the facts be undisputed or found,⁴² and also that a petition to revise under § 24 (b) is the only method of review in all other “bankruptcy proceedings proper.”⁴³ These sections are mutually exclusive, so that where it is possible to proceed under one method, the other may not be used.

42. See post, § 2888.

43. See post, § 2928.

However, the decisions are not uniform as to whether or not §§ 24 (a) and 24 (b) are exclusive of each other, the Circuit Courts of Appeal in most of the circuits holding that they are exclusive,⁴⁴ although in other circuits they hold that these sections are cumulative and that in a "controversy" arising out of bankruptcy, if the facts are not in dispute, the party has the option of appeal under § 24 (a) or petition to revise under § 24 (b) in matters of law only.⁴⁵

§ 2881. Distinction between Writ of Error and Appeal Preserved.—The distinction between the writ of error, which brings up matter of law only, and appeal, which, unless expressly restricted, brings up both law and fact, is preserved in bankruptcy.⁴⁶

Elliott v. Toeppner, 187 U. S. 327, 9 A. B. R. 50: "The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court, and been recognized by the legislation of Congress from the foundation of the government."

Duncan v. Landis, 5 A. B. R. 649, 106 Fed. 839 (C. C. A. Pa.): "The language of the section conferring upon the Circuit Courts of Appeal 'appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy over which they have appellate jurisdiction in other cases,' is broad and applicable to all 'controversies arising in bankruptcy proceedings,' etc. If there could have been any doubt in construing § 6 of the Judiciary Act of 1891, above quoted, that 'Final decisions in the District Court' included final decisions in such a court when acting as a court of bankruptcy, it has been removed by § 24 of the Bankrupt Act, as above quoted. For this purpose, among others, this provision seems to have been inserted. At all events, there can be no doubt now, in view of this provision, that inasmuch as the Circuit Courts of Appeal have appellate jurisdiction over District Courts in other cases, so,

44. See post, §§ 2887 and 2915.

45. See post, §§ 2883 and 2915.

46. *Bank v. Chicago Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280 (reversing 11 A. B. R. 79); *Holden v. Stratton*, 10 A. B. R. 786, 191 U. S. 115; *Mueller v. Nugent*, 184 U. S. 1, 7 A. B. R. 224; *In re Union Trust Co.* (*In re New Eng. Piano Co.*), 9 A. B. R. 767, 122 Fed. 937 (C. C. A. Mass.); *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.); *In re Mueller, Tr.*, 14 A. B. R. 256, 135 Fed. 711 (C. C. A. Ky.); *Bardes v. Hawarden Bank*, 4 A. B. R. 163, 178 U. S. 524; inferentially, *In re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.); *Printing Co. v. Brew. Co.*, 4 A. B. R. 183, 101 Fed. 699 (C. C. A. Ky.); *In re Abraham*, 2 A. B. R. 266, 96 Fed. 767 (D. C. Ala., reversed, on other grounds, sub nom. *Bryan v. Bernheimer*); *In re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); impliedly, *Dodge v. Norlin*, 13 A. B. R. 181, 133 Fed. 363 (C. C. A. Colo.).

Compare note to *In re Good*, 3 A. B. R. 605, 99 Fed. 389 (C. C. A. Mo.). But compare, as to case where no right to jury exists on question of adjudication of bankruptcy, *Simonson v. Sinsheimer*, 3 A. B. R. 824, 100 Fed. 426 (C. C. A. Ky.). Compare, also, *In re Jacobs*, 3 A. B. R. 675, 99 Fed. 539 (C. C. A. Mo.).

Mandamus improper to review erroneous adjudication of corporation not subject to bankruptcy, *In re Riggs*, 214 U. S. 9, 22 A. B. R. 720.

Citation Signed by Judge Is the Notice Required in Proceedings on Writ of Error.—The citation signed by the judge of the court to which the writ is addressed, or any judge or justice of the appellate court, is the notice required by § 998 of the Revised Statute for the removal of any cause to the appellate court. (*Exploration*) *Mercantile Co. v. Hardware & Steel Co.*, 24 A. B. R. 216, 177 Fed. 825 (C. C. A. Nev.).

also, they have the same jurisdiction over those courts when acting as courts of bankruptcy. That a jury trial has been ordered under the provisions of § 19 of the Bankrupt Act does not remove the controversy from this appellate jurisdiction. Section 24 does not state, nor was it necessary to state, how the appellate jurisdiction provided for should be invoked. The practice of the courts, but especially the act of Congress establishing the Court of Appeals, already referred to, had designated 'writs of error' and 'appeals,' as those terms are used and understood in our jurisprudence, as the appropriate methods for invoking the appellate jurisdiction. The form, scope, and peculiar functions of these two several methods of exercising appellate jurisdiction are well understood, and their peculiar and separate functions clearly established by the decisions and practice of the courts."

Where an adjudication of bankruptcy rests upon the verdict of a jury it is reviewable only upon writ of error, as in an action at common law.⁴⁷

§ 2881½. Distinction between Appeal and Petition to Revise.—There is the same distinction between an appeal, which brings up the whole case, both law and facts, and a petition to revise, which brings up matter of law only.

Loan & Trust Co. v. Graham, 14 A. B. R. 316, 135 Fed. 717 (C. C. A. W. Va.): "The pleadings in this case clearly present for the consideration of the court a petition for review of the action of the lower court, as distinguished from an appeal therefrom; and on such proceeding questions of law, and not of fact, can be considered and passed upon by this court."

In re *O'Connell*, 14 A. B. R. 238, 137 Fed. 838 (C. C. A. Mass.): "Of course we are limited to matters of law." This was a proceedings in bankruptcy proper, not appealable under § 25a, being a refusal to reopen an alleged unadministered bankruptcy estate.

In re *Rouse, Hazard & Co.*, 1 A. B. R. 234, 91 Fed. 96 (C. C. A. Ills.): "It will be seen that the statute contemplates two different proceedings and for two different purposes. The one is a review of an adjudication touching the merits of a claim which may rest upon a question of fact or a question of law. Such an adjudication can only be reviewed by appeal within ten days from the adjudication, and will only lie where the claim adjudicated amounts to \$500 or over. The appellate court reviews the facts as well as the law. In the other case the appellate court acts, not upon appeal, but by original petition of a complaining party, and is given authority to review and to revise in matter of law only the proceeding of the bankrupt court that is complained of."

In re *Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.): "In the case of an appeal the facts as well as the law are before this court for review. In the case of original petition this court has authority to review merely a matter of law arising in the course of the proceeding below. The latter is intended as a summary mode of reviewing any supposed erroneous holding upon a question of law and does not contemplate a review of the facts."

§ 2882. Also between Writ of Error and Petition to Revise.—Also, there is a distinction between a writ of error and a petition for revision.⁴⁸

^{47.} *Lennox v. Allen Lane Co.*, 21 A. B. R. 648, 167 Fed. 114 (C. C. A. Mass.).

Compare post, § 2894.

^{48.} Impliedly, In re *Cole*, 20 A. B.

While a writ of error and a petition to revise are similar in that both bring up matter of law only, there is also a distinction between these two methods of review. A writ of error is the appropriate method for review of a judgment at law in a "controversy" and also in a "proceeding in bankruptcy" proper where a jury trial is demanded under the act; while a petition to revise is the method for review of "matters of law only" in a "proceeding," except where appeal is specially provided for, and in some jurisdictions, also, in "controversies" where the facts are not in dispute.^{48a}

§ 2883. Holdings That Resort to Appeal or Petition to Revise Optional in Proper Case.—It has been held that resort to appeal or to petition for review is optional in a proper case.⁴⁹

In *re* McKenzie, 15 A. B. R. 679, 142 Fed. 383 (C. C. A. Ark., affirming 13 A. B. R. 227): " * * * the grant of the jurisdiction 'to revise in matter of law the proceedings of the several inferior courts of bankruptcy' by § 24 (b) and the grant of jurisdiction to review final decisions therein by appeal, are not exclusive of each other, but concurrent and cumulative. Decisions of questions of law may in many cases be revised by petition in the Circuit Court of Appeals, under § 24b during the pendency of the proceedings, which are also reviewable by appeal after final decisions have been rendered. The petition for revision in effect invokes a decision upon a demurrer, an appeal, one upon the merits of the case. The former permits the appellate court to determine legal questions without an examination of the evidence upon disputed issues of the fact, the latter allows it to review the entire case. In many cases parties aggrieved have the option to present questions of law by petition for revision, or questions of law and fact by an appeal.

"This case is of that nature. It involves the title to a portion of the estate of the bankrupt, not a claim of a creditor based upon his debt, obligation, or wrongful act. If the controversy had arisen in a Federal court when it was not sitting in bankruptcy, the final decision of it would have been reviewable in this court by writ of error or appeal. Jurisdiction to review the final judgment in this case upon both the law and the facts by an appeal was granted by § 24a, and jurisdiction to revise the action of the bankruptcy court herein by § 24b. As the petitioner sought to review a question of law only, the proceeding by petition for revision was the more appropriate and convenient method and this court has jurisdiction to entertain it. Act, March 3, 1891, ch. 517, § 6, 26 Stat. 828, Bankrupt Act, §§ 2 (7), 24a, 24b."

In *re* Holmes, 15 A. B. R. 689, 142 Fed. 392 (C. C. A. Colo.): "The existence of the debt is conceded. The only question which the case presents is whether or not the mortgagee is entitled to his preference by virtue of his chattel mortgage. This is a controversy over the title and property of the estate of the bankrupt between the trustee and the mortgagee, a party adverse to the trustee and the bankrupt, of which this court is given appellate jurisdiction by Bankrupt Act, § 24a. In the second year after the Act of 1898 was passed this court

R. 761, 163 Fed. 180 (C. C. A. Mo.), quoted at § 1859½.

Whether Joint Writ in Conspiracy Cases.—*Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

^{48a.} Compare ante, § 2880.

^{49.} Compare, §§ 2881, 2887 and 2915. In *re* Lee, 25 A. B. R. 436, 182 Fed. 579 (C. C. A.), apparently, In *re* Flatlands, 28 A. B. R. 476, 196 Fed. 310 (C. C. A. Wash.); apparently, In *re* Knosher, 29 A. B. R. 747, 197 Fed. 136 (C. C. A. Wash.).

decided that a petition to revise in matter of law under section 24b an appealable order or judgment, could not be maintained, and numerous decisions have since been rendered to the effect that the right of appeal and the right of revision are exclusive each of the other. In *re* Kuffler, 11 A. B. R. 469, 127 Fed. 125; In *re* Worcester County, 4 Am. B. R. 496, 102 Fed. 808, 811; *First Nat'l Bk. v. State Nat. Bank*, 12 Am. B. R. 440, 131 Fed. 430, 433; In *re* Friend, 13 Am. B. R. 595, 134 Fed. 778, 781, 67 C. C. A. 500, 503; In *re* Mueller, 14 Am. B. R. 595, 134 Fed. 715. This theory, however, has resulted in such contrariety of decision relative to the proper method of review of specific orders and such confusion and uncertainty in the practice that it has become necessary for lawyers in many instances to take an appeal and file a petition for revision in the same case in order to be sure to obtain a review of the ruling challenged. In *re* Worcester County, 4 Am. B. R. 496, 102 Fed. 808, 811. Thus it was held in the cases of In *re* Worcester County, 4 Am. B. R. 496, 102 Fed. 808, 814, 42 C. C. A. 637, 643, and In *re* Rouse-Hazard Co., 1 Am. B. R. 234, 91 Fed. 96, 33 C. C. A. 356, that an order which allowed a creditor a preference was reviewable by a petition for revision and not by appeal, while in *Cunningham v. German Ins. Bank*, 4 Am. B. R. 192, 103 Fed. 932, 935; In *re* Roche, 4 Am. B. R. 369, 101 Fed. 956; and In *re* Soudan Mfg. Co., 8 Am. B. R. 145, 113 Fed. 804, the opposite conclusion was reached.

"Moreover, under the theory that the appellate and revisory jurisdiction of the courts of appeals are exclusive each of the other, a large share of the time and labor of the judges of the courts of appeals, and of the lawyers who assist them, and no insignificant portion of the means of the litigants, all of which are imperatively demanded for the decision of the merits of the questions the parties seek to present, or of still more important issues of law, are consumed in the litigation, determination, and preparation of opinions concerning the question whether an order or proceeding in bankruptcy which is clearly reviewable must be reviewed by appeal or by petition for revision. Witness the authorities already cited and numerous other learned opinions upon this question which crowd the reports of the Courts of Appeals. In this state of the case, in the year 1903, an original petition to revise in matter of law proceedings of the district court of Kingfisher county, Okla., which culminated on April 6, 1903, in an order which dismissed an involuntary petition in bankruptcy was presented to this court. The order of the District Court was a 'judgment refusing to adjudge the defendant a bankrupt,' it was appealable under Bankrupt Act § 25a, and an appeal from it would have brought up for review all the preceding rulings in the case. This court certified these facts to the Supreme Court, and inquired whether it had jurisdiction to superintend and revise, in matter of law, these proceedings in the District Court of Kingfisher county, and the Supreme Court answered in the affirmative. The fact that the only real object of the petition in that case was to reverse the judgment refusing to adjudge the defendant a bankrupt was disclosed by the certificate to the Supreme Court and appears in the report of the case. *Plymouth Cordage Co. v. Smith*, 194 U. S. 311. After the rendition of this decision this court proceeded upon the original petition for revision to review and reverse the judgment of the District Court of Kingfisher county, and to direct it to take further proceedings in the case. In *re* Plymouth Cordage Co., 13 Am. B. R. 665, 135 Fed. 1000."

§ 2884. Thus, in Controversies.—Thus, it has been held that a litigant in a proper case has the option for review of orders in controversies arising out of bankruptcy proceedings, to proceed either by appeal or by

petition for revision.⁵⁰

In *re Lee*, 25 A. B. R. 436, 182 Fed. 579 (C. C. A.): "Undoubtedly there is a controversy here arising in a bankruptcy proceeding which is reviewable by appeal under § 24a, but there is no prohibition in the Bankruptcy Law of the revision in matter of law of such a controversy under § 24b, and, if no controversy arising in bankruptcy proceedings may be reviewed under the latter section, then nothing may be reviewed under it, because, where there is no controversy, there is nothing to review or to decide. The fact is that the grant of jurisdiction to the Circuit Court of Appeals to review by appeal the final decision of a controversy arising in bankruptcy proceedings of which that court would have had appellate jurisdiction if it had arisen in any other case in a Federal Court under § 24a, and the grant of jurisdiction to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy under § 24b, are not exclusive of each other, but cumulative or concurrent grants, the former of jurisdiction to review questions of law and of fact, the latter of jurisdiction to review questions of law alone. An aggrieved party often has a choice of these methods. A decision of a controversy arising in bankruptcy proceedings which involves the validity of the claim of a creditor to a lien upon the property of the bankrupt, or its proceeds under administration in possession of the court, is a proceeding in bankruptcy within the meaning of § 24b of the Bankruptcy Law and reviewable in matter of law upon a petition to revise."

§ 2885. If Facts Undisputed, Petition to Revise Only Remedy.—Where the facts are not disputed, it seems a petition for revision is the proper remedy.⁵¹

§ 2886. If Facts Disputed, May Be Reviewed Only if Appeal Available.—If, on the other hand, the facts are disputed, they may be reviewed, if reviewable at all, only by appeal.⁵²

Wells v. Sharp, 31 A. B. R. 348, 208 Fed. 393 (C. C. A. S. Dak.): "On examination of the record we find that the order and judgment complained of resulted from the consideration of disputed facts, and depended upon the findings made thereon. In such circumstances the proper remedy is an appeal under the provisions of § 24-a of the Bankruptcy Act, and not a petition to revise under § 24-b."

Francis v. McNeal, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.): "The proceedings before us cannot be treated as a petition for review. It is not con-

⁵⁰. See ante, § 2883; post, § 2915; *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 367 (C. C. A. Colo.), quoted at § 2915. In *re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.); apparently, *Hewitt v. Berlin Machine Wks.*, 194 U. S. 300, 11 A. B. R. 709; apparently, *Hutchinson v. Otis*, 10 A. B. R. 275, 123 Fed. 14 (C. C. A. Mass.); compare, *In re Stroum*, 27 A. B. R. 721, 192 Fed. 762 (C. C. A. Mass.); inferentially, *Printing Co. v. Brew Co.*, 4 A. B. R. 183, 101 Fed. 700 (C. C. A. Ky.), quoted at § 2915. Instance, *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.).

⁵¹. *Hutchinson v. LeRoy*, 8 A. B. R.

20, 113 Fed. 202 (C. C. A. Mass.), which was the case of an intervening petition, following trust funds. Impliedly, *Morgan v. Nat'l Bk.*, 16 A. B. R. 642, 145 Fed. 463 (C. C. A. W. Va.). Instance, *Moore v. Green*, 16 A. B. R. 651, 145 Fed. 480 (C. C. A. W. Va.). Impliedly, *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.).

⁵². Instance held not to be such dispute and uncertainty in record as to prevent petition for revision, *In re Great Western Mfg. Co.*, 18 A. B. R. 260, 152 Fed. 123 (C. C. A. Neb.).

In *re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.), quoted at § 2917.

fined to matters of law, but turns on questions of fact. If it can be entertained at all, it must be as an appeal."

Obiter, *Ellis v. Krulewitch*, 15 A. B. R. 617, 141 Fed. 954 (C. C. A.): "Moreover, if the final order of the referee, made in the proceeding subsequent to the order overruling the demurrer, were here for review, it is difficult to perceive how error of law could be predicated of it, because it is made upon evidence from which men of different minds might draw different conclusions, and a question of this nature is a question of fact, reviewable by appeal and not by petition for review."

§ 2887. Holdings That Right to Appeal or Writ of Error under § 24 (a) and Petition to Revise under § 24 (b) Mutually Exclusive.

—It has been held that the remedies afforded by §§ 24 (a) and 24 (b) are mutually exclusive, and that where a party can avail himself of one remedy, the other is not open to him.⁵³

Obiter, *In re Loving*, 224 U. S. 183, 27 A. B. R. 852: "In our judgment the rule was well stated in *In re Mueller*, 14 A. B. R. 256, 135 Fed. 711 (C. C. A. Ky.) by Mr. Justice Lurton, then circuit judge: "The "proceedings" reviewable [under § 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under § 25a. This would include questions between the bankrupt and his creditors of an administrative character and exclude such matters as are appealable under § 24a."

Barnes v. Pampel, 27 A. B. R. 195, 192 Fed. 525 (C. C. A.): "This proceeding is brought under § 24b of the Bankruptcy Act, to revise this latter decree so far as it sustains the mortgage given by Pampel directly to Kimpton. Motion is made to dismiss the proceedings upon the ground, first, that this court has no jurisdiction because the review sought can not be had under § 24b of the Act; and, second, because the case was decided on questions of fact, which can not be reviewed in this proceeding. Were we to entertain jurisdiction under 24b, it is clear we could not review the determination of the lower court upon the questions of fact involved in the decree sought to be reviewed. But, in our opinion, the proceedings must be dismissed for lack of jurisdiction.

"The distinction between 'proceedings' in bankruptcy reviewable under § 24b, and the 'controversies arising in bankruptcy proceedings' appealable under § 24a is clearly defined, the former including 'administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition, and the final settlement of the estate,'—the latter including 'those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general credit-

⁵³. Compare ante, §§ 2881, 2883, and post, § 2915; also, *Kirkpatrick v. Harnesberger*, 29 A. B. R. 439, 199 Fed. 886 (C. C. A. Ga.); *In re Hamilton Auto Co.*, 29 A. B. R. 163, 198 Fed. 856 (C. C. A. Ill.); *Kirsner v. Taliaferro*, 29 A. B. R. 832, 202 Fed. 51 (C. C. A. Va.); *In re Breyer Printing Co.*, 32 A. B. R. 796, — Fed. — (C. C. A., 7th cir.); *Doroshov v. Ott*, 14 A. B. R. 34, 134 Fed. 740 (C. C. A. N. J.); *McCarty v. Coffin*, 18 A. B. R. 148, 150

Fed. 307 (C. C. A. Tex.); compare, *In re Friend et al*, 13 A. B. R. 595, 134 Fed. 778 (C. C. A. Ill.); compare, *Morehouse v. Hdw. Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.); compare *Hewitt v. Berlin Mach. Wks.*, 194 U. S. 296, 11 A. B. R. 709; *Davidson v. Friedman*, 15 A. B. R. 489, 140 Fed. 853 (C. C. A. Ohio); *In re Jacobs*, 3 A. B. R. 671, 99 Fed. 539 (C. C. A. Mo.); *In re Doran*, 18 A. B. R. 154 Fed. 467. (C. C. A. Ky.).

ors.' The remedies afforded by the two sub-sections referred to are mutually exclusive."

In *re Martin*, 29 A. B. R. 935, 201 Fed. 31 (C. C. A. Ky.): "As regards the motion to dismiss the petition for revision, we must confess that much has been said in support of that remedy. But since this presents the question whether such a remedy is open to the petitioner in a case where appeal is regarded as allowable, we are disposed to adhere to the ruling of this court in *Barnes v. Pampel*, 27 A. B. R. 192, 192 Fed. 525 (C. C. A.), in which it was held that the two remedies are mutually exclusive. * * * We do not discover that the Supreme Court has passed upon this question; but it has recently decided that an appeal under § 25, and a petition to revise under § 24b are not both available in the same case."

In *re Mueller*, 14 A. B. R. 257, 135 Fed. 711 (C. C. A. Ky.): "There is no reason to suppose that one may elect whether he will bring up the order or judgment which he wishes to have reversed by appeal or by a petition for review.

"These remedies are exclusive of each other. That which may come here by appeal, can not come here for review. Otherwise the distinction which the Act recognizes will be ignored.

"Neither is there any reason for supposing that an order or judgment may be appealed when questions of fact are to be considered and reviewed upon petition if only a question of law is involved.

"The distinction between cases appealable and cases reviewable lies deeper and turns upon the character of case or question."

§ 2888. Appeal under § 25 (a) Exclusive Method of Review in Three Cases Specified.—Appeal is the exclusive method of obtaining review in bankruptcy proceedings proper in cases where the statute expressly permits appeals under § 25 (a); and a petition to revise under § 24 (b) will not lie in any such case.⁵⁴

In *re Loving*, 224 U. S. 183, 27 A. B. R. 852: "The question propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals, under § 24(b) by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under § 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and,

⁵⁴. *Adams v. Lumber Co.*, 29 A. B. R. 42, 202 Fed. 48 (C. C. A. W. Va.); *Grainger & Co. v. Riley*, 29 A. B. R. 114, — Fed. — (C. C. A. Ky.); *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

Contra Decisions before Ruling in In re Loving, 224 U. S. 183, 27 A. B. R. 852.—*Stevens v. Nave-McCord Co.*, 17 A. B. R. 612, 150 Fed. 71 (C. C. A. Colo.); *Taft Co. v. Century Sav. Bk.*, 15 A. B. R. 596, 141 Fed. 370 (C. C. A. Iowa); In *re McKenzie*, 15 A. B. R. 680, 142 Fed. 385 (C. C. A. Ark.); In *re Holmes*, 15 A. B. R. 689, 142 Fed. 392 (C. C. A. Colo.); In

re Ellis, 16 A. B. R. 221, 143 Fed. 103 (C. C. A. Ohio); instance, *Plymouth Cordage Co. v. Smith*, 194 U. S. 311; instance (point not adverted to), In *re Plymouth Cordage Co.*, 13 A. B. R. 666, 135 Fed. 1000 (C. C. A. Okla.); impliedly, *First Nat. Bk. of Louisville v. Holt*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.); impliedly, *Hal & Kaul Co. v. Friday* 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa.); impliedly, In *re Pfaffinger*, 19 A. B. R. 309, 154 Fed. 328 (C. C. A. Ky.); In *re New Eng. Breeders' Club*, 22 A. B. R. 124, 169 Fed. 586 (C. C. A. N. H.).

in certain cases, in this court. The proceeding under § 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under § 25. *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1, under § 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under § 25 a review by petition under § 24b. The object of § 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate."

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.): "It is also the settled rule of this court, in accordance with the great weight of authority in the federal courts, and in harmony with the case of *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, * * * and earlier decisions of the Supreme Court, that the provisions for appeal under § 25 (a) of the Bankruptcy Act and those for review under § 24 (b) are 'mutually exclusive,' and that where an appeal has been erroneously taken it can not be treated and sustained as a petition for review. In *re Mueller*, 14 Am. B. R. 256, 135 Fed. 712, * * * *Dickas v. Barnes*, 15 Am. B. R. 566, 140 Fed. 849, * * * *Davidson v. Friedman*, 15 Am. B. R. 489, 140 Fed. 853, In *re McMahon*, 17 Am. B. R. 530, 147 Fed. 684; *O'Dell v. Boyden*, 17 Am. B. R. 751, 150 Fed. 731."

Thus, the dismissal of a petition for discharge for want of prosecution, being in effect a final judgment denying discharge, has been held reviewable only by appeal.

In *re Kuffler*, 11 A. B. R. 469, 127 Fed. 125 (C. C. A. N. Y.): "It is sought to review this order (denying a discharge) by a petition for review under § 24 (b). * * *

"The provisions of the section cited refer to cases not provided for by appeal. Section 25 allows appeals to be taken in bankruptcy proceedings as in equity cases, 'from a judgment granting or denying a discharge.'"

In *re Mueller*, 14 A. B. R. 256, 135 Fed. 715 (C. C. A. Ky.): "These remedies are exclusive of each other. That which may come here by appeal cannot come here for review."

Likewise, the confirmation of a composition has been held not reviewable by writ of error, but only by appeal.⁵⁵

Again, an adjudication of bankruptcy has been held reviewable only by appeal.⁵⁶

In *re Good*, 3 A. B. R. 605, 99 Fed. 389 (C. C. A. Mo.): "Inasmuch as Congress has seen fit to prescribe by this section [25 (a)] the method in which a judgment adjudicating a person a bankrupt may be reviewed and for obvious reasons has fixed a short period, to wit, ten days, within which such appeal must be taken, we think it is manifest that such judgments cannot be reviewed on an original petition filed in this court in the mode prescribed by subdivision

⁵⁵. In *re Friend*, 13 A. B. R. 595, 134 Fed. 778 (C. C. A. Ills.). Compare, § § 2896, 2896½.

⁵⁶. But compare, where a jury trial is demanded, § 2894. In *re Worcester*

Co., 4 A. B. R. 500, 102 Fed. 808 (C. C. A. Mass.); *Coal Fields Co. v. Caldwell*, 17 A. B. R. 138, 147 Fed. 475 (C. C. A. W. Va.).

'b' of § 24. No time limit has been fixed under § 24 within which an original petition to superintend and revise in matter of law the action of the District Court in proceedings in bankruptcy may be filed, and for that reason we consider it improbable that it was the intention of the law makers to allow a judgment adjudicating a person a bankrupt to be reviewed otherwise than by appeal, and within the time expressly limited in § 25."

Lockman v. Lang, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.): "A proceeding in bankruptcy (here the adjudication of a person to be a bankrupt) is a proceeding in equity and orders and decrees therein cannot be reviewed by writs of error."

And the allowance or rejection of a claim over \$500 has been held reviewable only by appeal.⁵⁷

First Nat. Bk. v. State Nat. Bk., 12 A. B. R. 440, 444, 131 Fed. 430 (C. C. A. Mont.): "But in these cases it was held that no such rehearing or review could be had where the appeal is taken under the provisions of § 25a. The general consensus of opinion is that, § 25a having provided a means to review by appeal three kinds of judgments, every other means is excluded."

And it has been held, though it is submitted, erroneously, that a controversy over a mechanic's lien, the debt itself being conceded, could only be appealed, under § 25 (a), and that a petition to revise should be dismissed.⁵⁸

§ 2888½. Erroneous Holding as to Appealability, Decree Not a Mere Nullity.—Where the Circuit Court of Appeals has erroneously proceeded on an appeal when the matter was not appealable, its decree, nevertheless, is not a mere nullity, but is valid until reversed.

Obiter (matter being appealable) *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio): "Assuming that the decree of the District Court was reviewable and not appealable, the fact that we erroneously exercised jurisdiction under the appeal does not make the judgment a nullity. It was, at most, an error to be corrected by a timely application to this court upon a petition to rehear or by resort to some appellate procedure for the correction of error. We had jurisdiction to determine whether the case was appealable under § 24a or 25a of the Bankruptcy Act, or only reviewable upon a petition to review under § 24b. An erroneous determination of that somewhat cloudy question will not render the judgment void but only erroneous. But counsel say that the question of jurisdiction under the appeal is not shown by the record to have been raised or decided, and that this takes the judgment outside of the principle referred to. The distinction is not sound. The subject was one within the general jurisdiction of this court. The procedure by which our appellate jurisdiction might be invoked was either by a petition for review under § 24b, or by an appeal in one of the several subjects mentioned in 25a, or by appeal under the general appellate jurisdiction con-

⁵⁷. *In re Jourdan*, 7 A. B. R. 186 (C. C. A. Mass.); *Union Nat. Bk. v. Neill*, 17 A. B. R. 853 (C. C. A. Tex.); *Coal Fields Co. v. Caldwell*, 17 A. B. R. 138, 147 Fed. 475 (C. C. A. W. Va.); obiter, *Postlethwaite v. Hicks*, 21 A. B. R. 426,

165 Fed. 807 (C. C. A. W. Va.); *In re Loving*, 224 U. S. 183, 27 A. B. R. 852.

⁵⁸. *In re Streator Meta! Stamping Co.*, 30 A. B. R. 55, 205 Fed. 280 (C. C. A. Ill.). Compare post, § 2902.

ferred by § 24a 'of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.' When the power of this court to expunge one of its judgments is invoked upon the ground of its utter nullity, every presumption in favor of the judgment, which does not contradict the record, must be indulged. Limited as is the jurisdiction of the inferior nisi prius courts of the United States and subject to a presumption against jurisdiction throughout the progress of a cause, yet the judgments of these tribunals are not nullities, although jurisdiction is not shown upon the record. Such judgments are, although jurisdiction is not apparent, binding upon the parties and such apparent want of jurisdiction is available only in some form of review by a superior court. * * * It follows therefore from the exercise of jurisdiction that there is an incontestable presumption that the court determined that it had jurisdiction under the appeal."

DIVISION 1.

APPEALS TO CIRCUIT COURT OF APPEALS.

SUBDIVISION "A."

APPEALS IN BANKRUPTCY PROCEEDINGS PROPER.

§ 2889. Appeals in Bankruptcy Proceedings Proper.—Appeals as in equity cases may be taken in certain cases in the bankruptcy proceedings themselves from the courts of bankruptcy in which they are pending to the circuit court of appeals of the United States, and to the supreme court of the territories.⁵⁹

§ 2890. Order Appealed from Must Be Final Order.—The order appealed from must be a final order, else it is not appealable.⁶⁰

Stevens v. Nave-McCord Co., 17 A. B. R. 612, 150 Fed. 71 (C. C. A. Colo.): "A decision which finally determines the rights of parties to secure in that suit the relief they seek is a 'final decision,' within the meaning of that term in the act creating the Circuit Court of Appeals, although it is not a decision of the merits of the case and does not bar another suit or proceeding for the same cause. It is a final adjudication of the particular case, and that is sufficient to vest in the defeated parties the right of review. Act March 3, 1891. * * * The order of dismissal was of this nature and it was therefore a final decision.

"* * * The argument that this order was not a judgment because it was an order of dismissal relies too implicitly on a difference of names and lacks support by a difference in substance and effect. The dismissal of the petition is the act prescribed by the bankruptcy law to evidence a 'judgment refusing to adjudge the defendant a bankrupt.' Sections 18d, 18e, and 18g each require the court in the cases there specified to 'make the adjudication or dis-

⁵⁹. Bankr. Act, § 25 (a). *Coal Fields Co. v. Caldwell*, 17 A. B. R. 135, 147 Fed. 475 (C. C. A. W. Va.).

⁶⁰. *Ragan, Malone & Co. v. Cotton & Preston*, 28 A. B. R. 246, 200 Fed. 546 (C. C. A. Ga.).

But Interlocutory Order Awarding Injunction Appealable under Spe-

cial Statutory Provision of Act of 1891. —But under § 7 of Act of 1891, an appeal is allowable from an interlocutory injunction where a final order would have been appealable. *O'Dell v. Boyden*, 17 A. B. R. 751, 150 Fed. 731 (C. C. A. Ohio). Compare post, § 2922.

miss the petition.' The petitioners set forth the act of bankruptcy and prayed for an adjudication. The court refused to make the adjudication and in conformity with the provision of the bankruptcy law dismissed the petition. The order of dismissal was the judgment refusing to make the adjudication prescribed by the law, and it was appealable by the express terms of the act of Congress."

Thus, an interlocutory order reversing an order of a referee refusing to compel a bankrupt to produce his books for examination, is not appealable.⁶¹

§ 2891. Right of Appeal Can Not Be Enlarged nor Restricted by Court.—The right of appeal, as given by the statute, can neither be enlarged nor restricted by the court.⁶²

§ 2892. Such Appeals Permissible Only as to Adjudication, Discharge and Allowance of Claims.—Such appeals may be taken in the following cases and in no other cases arising in bankruptcy proceedings proper, namely, from a judgment adjudging or refusing to adjudge the defendant a bankrupt; from a judgment granting or denying a discharge; and from a judgment allowing or rejecting a debt or claim of \$500 or over.⁶³

§ 2893. First: Appeals from Adjudications or Refusals to Adjudge Bankrupt.—Appeals, under § 25 (a), may be taken from judgments adjudging or refusing to adjudge a debtor to be a bankrupt.⁶⁴

61. *Goodman v. Brenner*, 6 A. B. R. 470, 109 Fed. 481 (C. C. A. La.).

62. See post, § 2913. *Lockman v. Lang*, 12 A. B. R. 497, 128 Fed. 279 (C. C. A. Colo.). In *re Abraham*, 2 A. B. R. 266, 93 Fed. 783 (C. C. A. Ala., reversed, on other grounds, sub nom. *Bryan v. Bernheimer*, 181 U. S. 188, 5 A. B. R. 623; In *re Whitener*, 5 A. B. R. 207, 105 Fed. 180 (C. C. A. Tex.).

But compare action of court in *Columbia Iron Works v. Nat'l Lead Co.*, 11 A. B. R. 340, 127 Fed. 99 (C. C. A. Mich.), where the court refused to dismiss an appeal, although bond and citation were not filed until after ten days, although an appeal is not "taken" until bond is filed and citation issued.

63. Bankr. Act, § 25 (a). *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.). But see *Steele v. Buel*, 5 A. B. R. 163, 104 Fed. 968 (C. C. A. Iowa), apparently holding other cases in bankruptcy proceedings proper, e. g., disputes as to exemptions, etc., appealable under general equity powers.

Instance, no appeal from order sustaining or overruling exceptions to trustee's accounts. *Bank of Clinton v. Kondert*, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.).

64. Bankr. Act, § 25 (a). *Taft v. Century Savings Bk.*, 15 A. B. R. 596, 141 Fed. 369 (C. C. A. Iowa); *Coal Fields Co. v. Caldwell*, 17 A. B. R. 135, 147 Fed. 475 (C. C. A. W. Va.); *Stevens v. Nave-McCord Co.*, 17 A. B. R. 612, 150 Fed. 71 (C. C. A. Colo.); instance, *Columbia Iron Wks. v. Nat'l Lead Co.*, 11 A. B. R. 340, 127 Fed. 99 (C. C. A. Mich.); instance, *Zugalla v. Mercantile Agency*, 16 A. B. R. 67, 142 Fed. 927 (C. C. A. N. J., reversing In *re Mercantile Agency*, 13 A. B. R. 725); instance, In *re Good*, 3 A. B. R. 605, 99 Fed. 389 (C. C. A. Mo.); instance, *Merchants Nat'l Bk. v. Cole*, 18 A. B. R. 44, 149 Fed. 708 (C. C. A. Ohio); instance, *Keck Mfg. Co. v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

Order sustaining demurrer to petition to vacate adjudication of partnership in voluntary bankruptcy is not appealable within § 25 (a) but is reviewable within § 24 on petition for review. In *re Ives*, 7 A. B. R. 692, 113 Fed. 911 (C. C. A. Mich.).

Order holding a certain individual, himself not adjudged bankrupt, to be a member of a partnership which had already been adjudged bankrupt in its

§ 2894. **But No Appeal if Jury Trial Had.**—But if there has been a jury trial under § 19, the facts passed on by the jury may be reviewed only on writ of error, and appeal will not lie.⁶⁵

Elliott v. Toeppner, 187 U. S. 327, 9 A. B. R. 50: "The right to a trial by jury on written application thus given is absolute and cannot be withheld at the discretion of the court. In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such a trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common-law cases.

"* * * The proceedings in administration of the estate are equitable in their nature, but the bankruptcy courts act under specific statutory authority, and when, on an issue of fact as to the existence of ground for adjudication, a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law. This being so, judgments therein rendered are revisable only on writ of error."

Duncan v. Landis, 5 A. B. R. 649, 106 Fed. 839 (C. C. A. Pa.): "This trial by jury was a matter of right, and could not be denied if seasonably demanded. The verdict of the jury was conclusive of the issue of fact, and binding upon the court. Final judgment must be entered upon such verdict, either adjudging or refusing to adjudge the defendant to be a bankrupt. The trial, therefore, proceeded according to the course of the common law.

"Section 6, cl. 1, of the act to establish Circuit Courts of Appeals (26 Stat. 826) provides as follows:

"Sec. 6. The Circuit Court of Appeals established by this act shall exercise appellate jurisdiction to review, by appeal or writ of error, final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

"* * * On the other hand, where the right to trial by jury exists and has been invoked, neither the appellate court nor the court below can review the facts, but can only control in matters of law, which a writ of error is peculiarly fitted to raise in an appellate court. Indeed, the provision of the constitution that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the common law,' is decisive on this point; and since the case of *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732, no question can be made but that such a case as the present, in which there has been a trial by jury, as authorized by § 19 of the Bankrupt Act, is a trial according to the course of the common law, and cannot be reviewed by what is tech-

firm name, and to be therefore liable to the firm creditors, is not appealable. *Francis v. McNeal*, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.).

Order Refusing to Vacate Adjudication, Not Appealable.—But an order refusing to vacate an adjudication is not appealable; it is the order granting or refusing the adjudication which is appealable. *B-R. Elec. & Telephone Mfg. Co. v. Aetna Life Ins. Co.*, 30 A. B. R. 424, 206 Fed. 885 (C. C. A. Okla.).

Affirmance of Adjudication on Appeal Does Not Change Date of Adjudication.—*Moore Bros. v. Cowan*, 26 A. B. R. 902, 173 Ala. 536.

⁶⁵ *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 17 A. B. R. 1; *Bower v. Holzworth*, 15 A. B. R. 22, 138 Fed. 28 (C. C. A. Iowa); *obiter*, *In re Neasmith*, 17 A. B. R. 128, 147 Fed. 160 (C. C. A. Mich.); *Lennox v. Allen Lane Co.*, 21 A. B. R. 648, 167 Fed. 114 (C. C. A. Mass.).

nically known as an 'appeal,' but must be the subject of a writ of error, as that writ was understood and used at common law. * * *

"Prior to the statute of Westminster (13 Edw. 1, ch. 31) a writ of error at common law could be had only for an error apparent on the face of the record or for an error in fact, but by that ancient statute it was provided that exceptions to the opinion and direction of the court might, by bills of exception, be made a part thereof, and therefore be reached by the writ of error. In this way so much of the facts of the case as were necessary to make plain the question of law on which the exception was founded are incorporated in the record."

And Congress did not, by § 25 (a) providing that appeals as in equity cases may be taken from a judgment adjudging or refusing to adjudge defendant a bankrupt, attempt to empower the appellate court to re-examine the facts determined by a jury under § 19, otherwise than according to the rules of the common law; and § 25 (a) only applies to such judgments when trial by jury is not demanded and the court of bankruptcy proceeds on its own findings of fact. In such cases, the facts and the law are reviewable on appeal; while the verdict of a jury on which judgment is entered is conclusive as to the facts, and the judgment is reviewable only for error of law.⁶⁶ And upon an appeal granted under the provisions of § 25 (a) of the bankruptcy act from a final judgment refusing to adjudge the defendant a bankrupt rendered upon a trial by jury under § 19, the circuit court of appeals is not authorized to re-examine the proceedings and remand them for a new trial because of error in instructions given or refused or in the admission or rejection of evidence.⁶⁷

Where lack of jurisdiction does not affirmatively appear on the face of the record, but is dependent upon questions of fact which have been decided in favor of jurisdiction by the court below, the appellate court will not remand with instructions to dismiss the entire proceedings.

§ 2895. Second: Appeals from Judgments Granting or Denying Discharge.—Appeals, under § 25 (a), may be taken from judgments granting or denying discharge.⁶⁸

66. *Elliott v. Toepfner*, 187 U. S. 327, 9 A. B. R. 50.

67. *Elliott v. Toepfner*, 187 U. S. 327, 9 A. B. R. 50.

It has been held that where no right to trial by jury exists, as in cases of assignment, where the only two issues triable to a jury, namely, insolvency and the commission of the act of bankruptcy charged, are—the one not in issue and the other, provable by the record—the appeal is in equity, involving a re-examination of the facts as well as the law and does not follow the course of a hearing where a jury trial is waived. *Simonson v. Sinzheimer*, 3 A. B. R. 824, 100 Fed. 426 (C. C. A. Ky.): However, this case states the rule as to right of trial by

jury too narrowly. While it is true the question of insolvency raises an immaterial issue, yet a question of fact for the jury—perhaps under direction of the court—remains as to whether the act of bankruptcy had been committed.

Appeal Permissible Where Jury Called but Not Under § 19 of Act.—It has been held that where a jury is called but not under § 19, but only as advisers to the court, appeal would lie. *In re Neasmith*, 17 A. B. R. 128, 147 Fed. 160 (C. C. A. Mich.).

68. *Bankr. Act*, § 25 (a). *Obiter*, *Coal Fields Co. v. Caldwell*, 17 A. B. R. 135, 147 Fed. 475 (C. C. A. W. Va.). Compare, *Ross v. Saunders*, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.),

Thus, orders of dismissal of petitions for discharge are appealable.⁶⁹

In *re* Kuffler, 11 A. B. R. 467, 127 Fed. 125 (C. C. A. N. Y.): "The determination of the court below, dismissing the application for discharge when so long a time had elapsed that said application could not be reviewed was, in substance and effect, a judgment denying a discharge. As such it can be reviewed only by appeal."

But an order of the District Court merely affirming the conclusions of a special master who recommends the overruling of objections to the bankrupt's discharge, no further order being made in the case, not being final is not the granting or refusing of a discharge.⁷⁰ Whether appeal will lie from an order dismissing an application to revoke a discharge, as being in effect an order granting a discharge, is not decided.^{70a}

§ 2896. Includes Judgment Confirming a Composition.—This includes a judgment confirming a composition, for confirmation of a composition effects, by statute, a complete discharge.⁷¹

§ 2896¼. Whether Includes Refusing to Confirm Composition.—Where, however, the court refuses to confirm the composition because it is not for the best interests of the creditors, it has been held that the order would not be appealable under this section, since the court's action would not have the effect of denying a discharge to the bankrupt, the question whether a discharge should be granted to him or not being still open,⁷² but the question arises whether this is so where the refusal to confirm is by virtue of either the second or third provision of the Bankruptcy Act, § 12 (d).

as to appeals from refusals to confirm compositions, where compositions would operate as discharge.

69. In *re* Semons, 15 A. B. R. 822, 72 C. C. A. 683 (C. C. A. N. Y.).

70. *Ragan, Malone & Co. v. Cotton & Preston*, 28 A. B. R. 246, 200 Fed. 546 (C. C. A. Ga.).

70a. *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

71. In *re* Friend, 13 A. B. R. 595, 134 Fed. 778 (C. C. A. Ills.).

Who Are Proper Parties on Appeal in Composition Matters.—See ante, § 2838, as to who are proper and necessary parties to an appeal in composition cases. Also compare, *Ross v. Saunders*, 5 A. B. R. 350, 105 Fed. 915.

72. In *re* McVoy Hdw. Co., 29 A. B. R. 322, 200 Fed. 949 (C. C. A. Ill.). But compare, apparently contra, *U. S. ex rel. Adler v. Hammond*, 4 A. B. R. 736, 104 Fed. 62 (C. C. A. Tenn.), where an appeal was allowed from an order of the judge rejecting the composition. This case is cited in *In re McVoy Hdw. Co.*, supra, the court saying that it does not appear from the report of the case (*Adler v. Ham-*

mond, supra) whether the judge refused to confirm by reason of its not being for the best interests of the creditors, or by reason of one of the other two grounds specified in § 12(d); but upon an examination of the case below it would appear that the refusal was based upon the ground that it was not for the best interests of the creditors. In *re* Adler, 4 A. B. R. 583, at page 591. "The appeal demanded in this case is purely a disputed question of fact, whether it was for the best interest of the creditors to accept the offered composition. * * * His discharge is not involved; for, if the composition be not approved by the court, he may be discharged, nevertheless, in the regular way, and just as certainly released of his debts." Also see *Adler v. Jones*, 6 A. B. R. 245, 109 Fed. 967 (C. C. A. Tenn.), wherein it also appears that the refusal of the judge in the first instance was based upon the ground that it was not for the best interests of the creditors. Also compare, *Ross v. Saunders*, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.).

In *re* McVoy Hdw. Co., 29 A. B. R. 322, 200 Fed. 949 (C. C. A. Ill.): "If creditors should file objections to the confirmation of the composition on either the second or third grounds stated in § 12d, and if upon such an issue the court should adjudge that the bankrupt had been guilty of acts which would bar his discharge, it might be that such an order refusing to confirm the composition would stand as *res adjudicata* against any subsequent petition of the bankrupt to be discharged in due course, and thereby be the equivalent in legal effect of a judgment expressly denying a discharge, and therefore appealable; but we do not definitely pass upon that question, as it is not necessary to do so for the purposes of the present decision. We make the suggestion respecting clauses 2 and 3 of § 12d for the purpose of throwing into relief the fact that a refusal to confirm on the ground that the composition is unfair is no bar to a subsequent application for a discharge, and that the judge has cast upon him an affirmative duty, regardless of the question whether any creditor objects to confirmation on that ground or not."

§ 2896½. Thus, as to Application for Extension of Time to Apply for Discharge.—Thus, where the bankrupt has failed to apply for his discharge within the twelve months period, an order refusing him an extension of time would be appealable under this section, since such action, in effect, would be a denial of a discharge. On the other hand, should the court grant the bankrupt's application for an extension of time, the creditors could not appeal under § 25 (a) for the question of his discharge would be still undecided, and the proper method would be by petition to revise under § 24 (b).⁷³

§ 2897. Also Dismissals of Discharge for Want of Prosecution.—It also includes an order dismissing a petition for discharge for want of prosecution.⁷⁴

§ 2897½. Whether Includes Revocation of Discharge.—Whether a refusal to revoke a discharge is appealable has not been authoritatively determined.⁷⁵

But it would seem that the refusal to revoke a discharge is the equivalent of a reaffirmance of the right to a discharge, and so might be appealable under § 25a.

§ 2898. Third: Appeals from Allowance or Rejection of Claims.—Appeals may be taken under § 25 (a) from judgments allowing or rejecting a debt or claim of \$500 or over.⁷⁶

73. *Lindeke v. Converse*, 28 A. B. R. 596, 198 Fed. 618 (C. C. A. Minn.).

74. *In re Kuffler*, 11 A. B. R. 469, 127 Fed. 125 (C. C. A. N. Y.); *Lindeke v. Converse*, 28 A. B. R. 596, 198 Fed. 618 (C. C. A. Minn.).

75. *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

76. Bankr. Act, § 25 (a). *In re Stumpf*, 4 A. B. R. 267, 9 Okla. 639; *In re Friend, Moss & Morris*, 13

A. B. R. 595, 134 Fed. 778 (C. C. A. Ills.); *Union Nat'l Bk. v. Neil*, 17 A. B. R. 853, 149 Fed. 720 (C. C. A. Tex.); *obiter*, *Coal Fields Co. v. Caldwell*, 17 A. B. R. 135, 147 Fed. 475 (C. C. A. W. Va.); *Adams v. Deckers Lumber Co.*, 29 A. B. R. 42, 202 Fed. 48 (C. C. A. W. Va.); *instance*, *In re Davis*, 23 A. B. R. 446, 174 Fed. 556 (C. C. A. Pa.).

Thus, as to claims for rent, Postle-

In re Cosmopolitan Power Co., 14 A. B. R. 606, 137 Fed. 858 (C. C. A. Ills.): "As more than \$500 of appellant's claim was disallowed, an appeal under § 25 (a) is undoubtedly proper."

§ 2899. Amount in Dispute, Not Amount of Entire Claim, Governs.—It is the amount put in controversy, not the amount of the original claim, that determines whether sufficient is involved to permit of appeal under § 25 (a).⁷⁷

Gray v. Mercantile Co., 14 A. B. R. 780, 138 Fed. 344 (C. C. A. N. Dak.): "The appeal does not put in controversy the entire claim, but only what was rejected. * * * It is not easily believable that the Congress would grant a right of appeal to one whose claim for \$500 or over is rejected to the extent of \$425, the balance being allowed, and would at the same time deny a right of appeal to one whose claim for \$425 is rejected in its entirety. The amount put in controversy by the appeal would be the same in either instance. So, also, the injury to the claimant would be the same in either case if the rejection were wrongful. The purpose of the Congress, in restricting the right of appeal was evident to avoid inconvenience, delay, and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy. When read with due regard to this purpose, the restriction plainly has reference, not to the amount of the original claim, but to the amount of the allowance or rejection; that is, to the amount which will be put in controversy by the appeal. Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; Dows v. Johnson, 110 U. S. 223, 3 Sup. Ct. 640, 28 L. Ed. 128. As the decree below did not allow or reject any debt or claim of \$500 or over, there was no right of appeal therefrom."

But where one creditor holds several disputed claims involved in one general course of dealing, each less than \$500 but all together aggregating \$500 or more, he may appeal.⁷⁸

§ 2900. Debt Must Have Been Owed by Bankrupt, Mere Lien on Property Insufficient.—The debt or claim, to be appealable under § 25 (d), must have been that of a creditor of the bankrupt, not that of a mere lienholder upon his property who is not at the same time also a creditor.⁷⁹

In re Columbia Real Estate Co., 7 A. B. R. 441, 112 Fed. 643 (C. C. A. Ind.): "The last mentioned clause is probably applicable alone to a debt or claim against the bankrupt when presented for proof in due course, but it is not applicable here for the reason (hereinafter referred to) that this order does not in any sense operate as a disallowance or rejection of the petitioner's alleged equitable mortgage claim."

thwaite v. Hicks, 21 A. B. R. 70, 165 Fed. 897 (C. C. A. W. Va.).

Similarly, as to proceedings to disallow a claim previously allowed, Kiskadden v. Steinle, 29 A. B. R. 346, 203 Fed. 375 (C. C. A. Ohio).

77. Inferentially, In re Cosmopolitan Power Co., 14 A. B. R. 603, 137 Fed. 858 (C. C. A. Ills.).

78. Obiter, Gray v. Mercantile Co.,

14 A. B. R. 784, 138 Fed. 344 (C. C. A. N. Dak.).

79. Impliedly, Cunningham v. Bank, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.); impliedly, Davidson v. Friedman, 15 A. B. R. 489, 140 Fed. 853 (C. C. A. Ohio); In re Soudans Mfg. Co., 8 A. B. R. 45, 113 Fed. 806 (C. C. A. Ind.); In re National Bk., 14 A. B. R. 182, 135 Fed. 62 (C. C. A. Ohio). See analogously, ante § 2871.

§ 2901. Where Lien or Priority Incident to Disputed Debt, Its Validity, Priority, etc., Appealable.—But where the lien, or right of priority in distribution, is also incident to a disputed debt owing by the bankrupt, its validity, extent and priority may be determined by appeal under § 25 (a).⁸⁰

Thus, where it is a lien that is incident to the disputed debt.⁸¹

Or where it is a right of priority of payment before dividends that is incident to the disputed debt.

In re Cosmopolitan Power Co., 14 A. B. R. 604, 137 Fed. 858 (C. C. A. Ills.): "The case being here on appeal respecting the amount of the claim (franchise tax) we think appellant may also present any question concerning the security or rank of the debt, as an incident thereof, * * * though the question of lien or priority, if alone involved, could be reviewed only under § 24b."

§ 2902. But Where Debt Undisputed Mere Fact That Lien or Priority Incident to Debt Is Disputed, Insufficient.—But, where the sole controversy is about the lien or the right to priority before dividends, and the debt itself is undisputed, merely that the lien or right of priority is incident to a debt will not suffice for appeal as to the lien or priority.⁸²

Thus, as to a lien.⁸³

Hutchinson v. Otis, 190 U. S. 552, 10 A. B. R. 135: "A petition was filed by Otis, Wilcox & Co., asserting a lien on the proceeds of a seat in the New York Stock Exchange, which formerly belonged to the bankrupts. This lien had not been insisted on by Otis, Wilcox & Co., because of their impression that they had been paid effectually. No one having changed his position on the faith of their waiver, the District Court allowed the lien. The Circuit

⁸⁰. See ante, § 2869. *Bell v. Arledge*, 27 A. B. R. 773, 192 Fed. 837 (C. C. A. Tex.).

⁸¹. *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 and 101 Fed. 977 (C. C. A. Ky.); *In re Nat'l Bk.*, 14 A. B. R. 182, 135 Fed. 62 (C. C. A. Ohio); *In re Mueller Tr.*, 14 A. B. R. 256, 135 Fed. 711 (C. C. A. Ky.); *obiter*, *Hutchinson v. Otis*, 10 A. B. R. 135, 190 U. S. 552; *In re Doran (Moorman v. Beard)*, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); *In re Loving*, 224 U. S. 183, 27 A. B. R. 852; *Grainger & Co. v. Riley*, 29 A. B. R. 114, 201 Fed. 901 (C. C. A. Ky.); *Century Savings Bk. v. Moody*, 31 A. B. R. 586, 209 Fed. 775 (C. C. A. Iowa); *Snow v. Dalton*, 29 A. B. R. 240, 203 Fed. 843 (C. C. A. N. Car.).

Compare, *Burow v. Grand Lodge*, 13 A. B. R. 542, 133 Fed. 708 (C. C. A. Tex.), wherein a creditor holding a deed of trust on land claimed as exempt, intervened, and prayed that property mentioned in the deed of trust be adjudged subject thereto and ordered sold free and clear by the trust-

tee, where the mortgage provides for attorney's fees on "foreclosure," the dispute thus involving the amount of a debt. But in this case it does not appear that there was any dispute over the amount of validity of the debt.

In re Roche, 4 A. B. R. 369, 101 Fed. 956 (C. C. A. Tex.), a case of a disputed lien of a mortgagee for attorney's fees on proceeds of land.

⁸². See ante, § 2870. *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.): Mortgagee's attorney's fee on foreclosure allowed as a claim but denied as a lien. Contra, in effect, *In re Streator Metal Stamping Co.*, 30 A. B. R. 55, 205 Fed. 280 (C. C. A. Ills.).

⁸³. *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.); *Century Savings Bk. v. Moody*, 31 A. B. R. 586, 209 Fed. 775 (C. C. A. Iowa). But compare, *Burow v. Grand Lodge*, 13 A. B. R. 544, 133 Fed. 708 (C. C. A. Tex.). Contra, in effect, *In re Streator Metal Stamping Co.*, 30 A. B. R. 55, 205 Fed. 280 (C. C. A. Ills.).

Court of Appeals held that this portion of the decree of the District Court was not subject to an appeal to the Circuit Court of Appeals. The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in court, and is not a proceeding in bankruptcy. Under the circumstances of this case it seems to us that the petition was incident to the claim (*Cunningham v. German Ins. Bank*, 4 Am. B. R. 192, 101 Fed. 977), and was a bankruptcy proceeding under § 2, cl. 7, within the meaning of § 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not 'a judgment allowing or rejecting a debt or claim of five hundred dollars or over,' within § 25a, 3, and was not an independent ground of appeal."

Thus, as to a right of priority.⁸⁴

In *re Rouse, Hazard & Co.*, 1 A. B. R. 239, 91 Fed. 96 (C. C. A. Ills.): "If the controversy coming before us was with respect to the merits of the several claims of these labor claimants, we should be wholly without jurisdiction, for there is neither an appeal nor does the amount allowed to any one claimant exceed the sum of \$500. But there is no controversy here with respect to the merits of the claims. The debts are conceded. The counsel for the labor claimants, the respondents here, distinctly states in his brief, 'and no objection is raised in this court as to the validity or justness of any claims.' The only question then sought to be raised by this petition is whether, conceding the justness of the claims, they are as a matter of law entitled to priority of payment over the general creditors of the bankrupt. That is a question which we think clearly falls within the subd. b of § 24, and can be determined by this court upon petition."

But the disputed lien may be appealable under § 24 (a), as being a "controversy" arising out of bankruptcy.⁸⁵

§ 2903. Not to Split Case and Dismiss Portion Affecting Lien or Priority.—It is not necessary to split the case on appeal, and to dismiss the portion that affects the lien or priority.⁸⁶

§ 2904. "Claim" Refers Only to Money Demand.—The word "claim" as used in § 25 (a) refers to, and means, only a money demand.⁸⁷

§ 2905. And to "Claims" Presented for "Proof" against Bankrupt Estate.—And only to claims presented for "proof" against the bankrupt estate.⁸⁸

Holden v. Stratton, 191 U. S. 116, 10 A. B. R. 788: "And while the word 'claim' is used in its signification of the demand or assertion of a right in subdivision 11 of § 2, in respect of 'all claims of bankrupts to their exemptions,' it is also used in many parts of the act, and, as we think, in § 25, as referring

84. *Obiter*, In *re Cosmopolitan Power Co.*, 14 A. B. R. 606, 137 Fed. 858 (C. C. A. Ills.); *obiter*, In *re First Nat'l Bk. of Canton*, 14 A. B. R. 182, 135 Fed. 62 (C. C. A. Ohio).

85. In *re First Nat'l Bank of Canton*, 14 A. B. R. 182, 135 Fed. 62 (C. C. A. Ohio).

86. In *re Cosmopolitan Power Co.*, 14 A. B. R. 606, 137 Fed. 858 (C. C. A.

Ills.); apparently *contra*, In *re Worcester County*, 4 A. B. R. 496, 102 Fed. 808 (C. C. A. Mass.).

87. In *re Whitener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tex., distinguished in *Burow v. Grand Lodge*, 13 A. B. R. 545, 133 Fed. 708).

88. *Davidson v. Friedman*, 15 A. B. R. 489, 140 Fed. 853 (C. C. A. Ohio), quoted *post*, § 2907.

to debts (which by subsection 11 of § 1 includes 'any debt, demand or claim provable in bankruptcy') presented for proof against estates in bankruptcy."

Other claims are reviewable when reviewable at all only by petition to revise.⁸⁹

§ 2906. And Not to "Claims" for Exempt Property.—And does not refer to claims for exempt property.⁹⁰

§ 2906½. Nor to Accounts or Reports of Trustees.—Nor to orders sustaining or overruling exceptions to trustee's accounts.⁹¹

§ 2907. Nor, Probably, to "Claims" for Costs and Expenses of Administration.—But whether a claim which represents expenses or costs of administration under § 64 (b) is that of a creditor and is appealable under § 25 (a) is a question.

Thus, it has been intimated that the trustee's expenses for stenographer and attorneys are so appealable; and, on the other hand, it has been held directly that they are not so appealable.⁹²

Obiter, *Gray v. Mercantile Co.*, 14 A. B. R. 784 (C. C. A. N. Dak.): "Counsel have proceeded upon the assumption that a claim which represents expenses or costs of administration is a 'debt or claim' within the meaning of the provision before quoted granting and restricting the right of appeal. The assumption appears to be sustained by the Bankruptcy Act, notably by § 64b; but, if it were not, that would be another reason why there would be no right of appeal from the allowance or rejection of any of the claims other than that of Carroll, which is not of that character."

Davidson v. Friedman, 15 A. B. R. 489, 140 Fed. 853 (C. C. A. Ohio): "This is an appeal from an order allowing expenses incurred by the bankrupt's trustee for counsel fees in the realization of the assets of the estate * * * and it is insisted that the order appealed from is appealable under § 24 (a) [25 (a)], as a judgment 'allowing a debt or claim of \$500 or over,' and the case of *Pratt v. Bothe* is cited. *Pratt v. Bothe* involved a claim which was a debt against the bankrupt for legal services before and after adjudication. The debt was proven as such and priority asserted under § 60d of the Act. We entertained an appeal, though no question was made, upon the ground that it was an appeal from a judgment disallowing a claim or debt in excess of \$500. It was not a claim or expense or debt incurred by the trustee in course of administration. It had its foundation in a contract antecedent to bankruptcy and was in every sense a debt presented for proof against the estate.

"The matter involved in the present appeal is an expense incurred by the trustee in the course of his administration. It was not a debt against the bankrupt and had no existence before adjudication."

⁸⁹. Compare ante, § 2880, et seq.

⁹⁰. *Holden v. Stratton*, 191 U. S. 116, 10 A. B. R. 788, quoted ante, § 2905, *Steele v. Buel*, 5 A. B. R. 166, 104 Fed. 968 (C. C. A. Iowa). Instance, *Holden v. Stratton*, 198 U. S. 202, 14 A. B. R. 94.

⁹¹. *Bank of Clinton v. Kondert*, 20

A. B. R. 178, 159 Fed. 703 (C. C. A. La.); compare also, ante, § 2868; post, § 2930, as to trustees' reports of exempted property.

⁹². In re *Curtis*, 4 A. B. R. 17, 100 Fed. 784 (C. C. A. Ills.).

It has also been held, however, that the attorneys' fees of the petitioning creditors are so appealable.⁹³

Probably the rule of *Davidson v. Friedman* is based upon the better reasoning.

Thus, a claim of creditors for reimbursement of attorneys' fees and other expenses, incurred in contesting unjust claims and in proceedings to recover assets, is not appealable under § 25 (a) (3), nor appealable at all, but reviewable only upon petition for review.⁹⁴

§ 2908. Nor to "Claims" of Strangers to Property in Trustee's Possession, nor of Trustee to Property in Strangers' Hands.—Nor does it refer to claims of third parties to property in the trustee's possession, nor to claims of the trustee against third parties for the surrender of property in their possession.⁹⁵

§ 2909. Disallowance of Claim because Preference Not Surrendered, Appealable.—Orders disallowing claims for failure to surrender preferences are appealable.⁹⁶

Cooper v. Miller, 30 A. B. R. 194, 203 Fed. 383 (C. C. A. Ky.): "Within ten days an appeal was prayed and allowed, but only to the order reversing the referee; and since that order distinctly involved both rejection and allowance of claims each for more than \$500, also a controversy of fact touching the financial condition of the bankrupt at the time Miller received the payments in dispute, and also the existence or not of reasonable cause on his part to believe that such payments would, if enforced, effect a preference (§ 60b of the Bankruptcy Act, as amended in 1910), we think the case is rightly pending here upon appeal, under § 25a (3) of the Bankruptcy Act."

§ 2910. Rejection or Allowance of Set-Off Appealable.—The rejection or allowance of a set-off is appealable.⁹⁷

§ 2911. No Appeal in Bankruptcy Proceedings Proper Except in Three Cases of § 25 (a) Mentioned.—And appeals may not be taken

93. Compare appeal of prepaid bankrupt's attorney fees, *Pratt v. Bothe*, 12 A. B. R. 529, 130 Fed. 670 (C. C. A. Mich.).

94. *Ohio Valley Bank Co. v. Switzer*, 18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio).

95. *In re Whitener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tex.); *In re Abraham*, 2 A. B. R. 289, 93 Fed. 767 (C. C. A. Ala., reversed, on other grounds, sub nom. *Bran v. Bernheimer*).

96. *Livingston v. Heineman*, 10 A. B. R. 39, 120 Fed. 756 (C. C. A. Ohio); *In re Jourdan*, 7 A. B. R. 186, 111 Fed. 726 (C. C. A. Mass.).

97. *Western Tie and Timber Co. v. Brown*, 13 A. B. R. 447, 196 U. S. 502

(reversing 12 A. B. R. 111), where the court sustained the right to appeal from the Circuit Court of Appeals to the Supreme Court under § 25 (b) (1) giving such right in cases where a claim appealable under § 25 (a) amounts to \$2,000 or over, the court saying: "It clearly appears from the record that in the claim filed on behalf of the tie company there was embodied, as an integral part thereof, as a proper credit or set-off, the sum retained from the wages of employees for supplies furnished by the bankrupt, and the rejection of the claim was based upon the denial of the right to set-off."

Morehouse v. (Pacific) Hardware & Steel Co., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

in bankruptcy proceedings proper in any other cases than those limited in § 25 (a);⁹⁸ review in other cases can be had only by petition to revise.⁹⁹

Holden v. Stratton, 191 U. S. 115, 10 A. B. R. 788: "This case (refusal of exemptions) was not taken to the Court of Appeals by appeal, as in equity cases, to be re-examined on the facts as well as the law, nor could it have been, for it was not one of the cases enumerated in § 25a."

Bank v. Title & Trust Co., 198 U. S. 280, 14 A. B. R. 105: "If the proceedings in the District Court (adjudication as to validity of lien on property taken summarily from adverse claimants over protest) was a proceeding in bankruptcy and not an independent suit, no appeal lay to the Circuit Court of Appeals, and the jurisdiction of that court was confined to revision in matter of law 'on due notice and petition' under clause b of § 24."

Ingram v. Wilson, 11 A. B. R. 194, 125 Fed. 913 (C. C. A. Iowa): "We are of opinion, however, that the order in question (sale of exempt real estate) is an order made in the course of a bankruptcy proceedings, which this court is empowered to revise on a petition for review by virtue of § 24 of the Bankruptcy Act. It is not one of those cases in which an appeal in the ordinary form is expressly authorized by § 25 of the Bankrupt Act. For that reason we are constrained to hold that it is reviewable by an original petition for review."

SUBDIVISION "B."

APPEALS IN CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.

§ 2912. Appeals in "Controversies Arising in Bankruptcy Proceedings."—Appeals may be taken to the circuit court of appeals in "controversies arising in bankruptcy proceedings," as distinguished from "bankruptcy proceedings" themselves, from courts of bankruptcy from which it has appellate jurisdiction in other cases.¹

That is to say, whilst appeals in bankruptcy proceedings proper are restricted to the cases specifically allowed by the provisions of the Bankruptcy Act itself, in all other cases where controversies arise in the bankruptcy proceedings, the right of appeal is the same as if the case had not arisen out of a bankruptcy.²

⁹⁸. *Bank of Clinton v. Kondert*, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.).

⁹⁹. *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.); *Fisher v. Cushman*, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Mass.); *obiter*, *Goodman v. Brewer*, 6 A. B. R. 471, 109 Fed. 481 (C. C. A. La.); *contra*, *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa).

1. Bankr. Act, § 24 (a): "* * * the Circuit Court of Appeals of the United States * * * in vacation in chambers during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they

have appellate jurisdiction in other cases."

Inferentially, *In re Columbia Real Estate Co.*, 7 A. B. R. 444, 112 Fed. 645 (C. C. A. Ind.); appeals and reviews in Indian Territory, *In re Blair*, 5 A. B. R. 792, 106 Fed. 662 (C. C. A. Ind. Terr.).

"Within their jurisdiction" has reference to existing appellate jurisdiction and does not operate to extend it. *In re Blair*, 5 A. B. R. 793, 106 Fed. 662 (C. C. A. Ind. Terr.).

Even if not raised in argument, the court may consider the question of its appellate jurisdiction. *In re Columbia Real Estate Co.*, 7 A. B. R. 444, 112 Fed. 645 (C. C. A. Ind.).

2. *Hutchinson v. Otis*, 190 U. S. 552, 10 A. B. R. 135; compare, *Hutchinson*

Hewitt v. Berlin Machine Co., 194 U. S. 296, 11 A. B. R. 709: "And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under § 24a, exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (*Holden v. Stratton*, 191 U. S. 115, 10 A. B. R. 786), while § 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by § 2, to settle the estates of bankrupts, and to determine controversies in relation thereto."

Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.): "Under the judiciary act of March 3, 1891, the Circuit Courts of Appeals had 'jurisdiction to review by appeal or by writ of error final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law. * * *

"The case here under consideration was not provided for in the preceding section of the Act or in any other way than in § 6. The decision of the District Court that the lien by mortgage claimed by the appellant could not be enforced against the trustee who had seized the property which constituted the security for his debt was a final decision. It rendered the question of the mortgagee's right to his security *res adjudicata*. It finally determined a separate, collateral controversy distinct from the general subject of litigation in the proceeding in bankruptcy. * * * If this controversy had arisen in a Federal court when it was not sitting in bankruptcy, the final decision of it would have been reviewable in this court by writ of error or appeal. Section 25a vests the Courts of Appeals with appellate jurisdiction of controversies arising in bankruptcy proceedings of which they have jurisdiction in other cases. As this court has appellate jurisdiction of this controversy in other cases in which it might be presented in a Federal court, it has such jurisdiction when it arises in proceedings in bankruptcy."

In re First National Bk. of Canton, 14 A. B. R. 180, 135 Fed. 62 (C. C. A. Ohio): "This is an appeal from an order of the District Court, sitting in bankruptcy, disallowing a mortgage lien claimed by the First National Bank of Canton, Ohio, upon a stock of merchandise and certain store fixtures of the bankrupt Martin K. Purdy. * * *

"This may be properly regarded as a controversy arising out of the settlement of the bankrupt's estate and the appeal to this court as one admissible under § 24a of the Bankruptcy Law."

Obiter, *Delta Nat'l Bk. v. Easterbrook*, 13 A. B. R. 340 (C. C. A. Tex.): "In the lower court this was an action at law for the specific recovery of personal property, and was a controversy arising in bankruptcy proceedings, of which the lower court had jurisdiction under § 70 (e) as amended. * * * From the final judgment rendered in the case no appeal lies under § 25 * * * and, if this court had jurisdiction to review the same, the authority must be found under § 24a * * * and in the appellate jurisdiction of the Circuit Courts of Appeals, as granted by the Act of 1891, which jurisdiction is not restricted by

v. Otis, 10 A. B. R. 275, 123 Fed. 14 (C. C. A. Mass.); *Burleigh v. Foreman*, 125 Fed. 217, 11 A. B. R. 74, 12 A. B. R. 88 (C. C. A. Mass.); *In re*

McKenzie, 15 A. B. R. 681, 142 Fed. 383 (C. C. A. Ark.); *In re Mueller Tr.*, 14 A. B. R. 256, 135 Fed. 711 (C. C. A. Ky.).

the Bankruptcy Law; and therefore decrees in equity and judgments at law, although in controversies arising in bankruptcy proceedings, may be revised by this court."

§ 2913. Appeal a Matter of Right, Not to Be Enlarged nor Restricted by Court.—An appeal is a matter of right, given by statute, and can neither be restricted nor enlarged by the court.³

§ 2914. Under § 24 (a) Both Law and Fact Reviewed.—Under § 24 (a), the circuit court of appeals reviews the facts as well as the law.⁴ Under § 24 (b) it revises only in matters of law.⁵

§ 2915. Whether Litigant Has Option, in Proper Case, Either to Appeal or to Petition for Revision.—It has been held that a litigant has the option, in a proper case, to review a decision by appeal or by petition for revision in matters of law, and that this appellate jurisdiction is not excluded nor revoked by the provision of § 25 (a), which grants jurisdiction over three specified classes of cases and limits the time for invoking the appeal to ten days, nor by § 24 (b), which vests the power of supervision and revision in matter of law in the court of appeals.⁶

In *re Lee*, 25 A. B. R. 436, 182 Fed. 579 (C. C. A.): "The fact is that the grant of jurisdiction to the Circuit Court of Appeals to review by appeal the final decision of a controversy arising in bankruptcy proceedings of which that court would have had appellate jurisdiction if it had arisen in any other case in a Federal court under § 24a, and the grant of jurisdiction to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy under section 24b, are not exclusive of each other, but cumulative or concurrent grants, the former of jurisdiction to review questions of law and of fact, the latter of jurisdiction to review questions of law alone. An aggrieved party often has a choice of these methods. A decision of a controversy arising in bankruptcy proceedings which involves the validity of the claim of a creditor to a lien upon the property of the bankrupt, or its proceeds under administration in possession of the court, is a proceeding in bankruptcy within the meaning of § 24b of the Bankruptcy Law and reviewable in matter of law upon a petition to revise."

Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.): "Nor is there anything in the grant by section 24b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy which in any way affects or limits the general appellate jurisdiction vested by the sections

3. *Lockman v. Lang*, 12 A. B. R. 497, 132 Fed. 1 (C. C. A. Colo.); In *re Abraham*, 2 A. B. R. 266, 93 Fed. 784 (C. C. A. Ala.); In *re Whitener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tex.).

But compare *Columbia Iron Wks. v. Nat'l Lead Co.*, 11 A. B. R. 340, 127 Fed. 99 (C. C. A. Mich.), where the court seems to have refused to dismiss an appeal "taken" after the expiration of the ten days, "taking" not being perfected until bond and citation.

See ante, § 2891.

4. See ante, § 2882. Impliedly, In *re Leech*, 22 A. B. R. 599, 171 Fed. 622

(C. C. A. Ky.); *Houghton v. Burden*, 228 U. S. 161, 30 A. B. R. 16, quoted at § 3023; In *re Lee*, 25 A. B. R. 436, 182 Fed. 579 (C. C. A.), quoted at § 2915.

5. See post, § 2937. Impliedly, In *re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.); In *re Frank*, 25 A. B. R. 486, 182 Fed. 794 (C. C. A. N. D.); In *re Lee*, 25 A. B. R. 436, 182 Fed. 579 (C. C. A.), quoted at § 2915.

6. See ante, §§ 2881, 2883, 2884, for further citations. Compare, In *re Stroum*, 27 A. B. R. 721, 192 Fed. 762 (C. C. A. Mass.).

of the law which have been considered. The Act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right of revision in matter of law. It grants the right of appeal and the right of superintendence and revision in matter of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked.

"Any other construction of the bankruptcy law would deprive litigants in the courts of bankruptcy of a review of the decisions of the most important controversies determined by those courts, of controversies between the trustee and third parties over the title to, and the liens upon, the alleged property of the estate. A revision as a matter of law is not equivalent to nor is it adequate to take the place of an appeal. Many controversies of the nature of that here under consideration arise which involve large interests in which there is little doubt of the law, but in which the correctness of the finding of facts is both crucial and doubtful. The Act plainly declares that the final decisions of such controversies may be reviewed by appeals, and no persuasive reasons convince that this declaration should not have its full effect."

Inferentially, *Printing Co. v. Brew. Co.*, 4 A. B. R. 183, 101 Fed. 700 (C. C. A. Ky.): "If the petitioner had desired a review of the question of the allowance of his claim upon both law and fact, he should have appealed."

On the other hand, it has been held that these remedies are mutually exclusive, so that where an appeal is permitted that remedy must be pursued, and a petition to revise will not lie.⁷

§ 2916. May Treat "Appeals" as Petitions for Revision.—The reviewing court may (where only questions of law are presented) treat proceedings denominated "appeals" as merely proceedings on review for reversal of the judgment below, and may hear the case on the record already made and not de novo.⁸

In *re William's Estate (Anheuser Busch v. Harrison)*, 19 A. B. R. 389, 156 Fed. 934 (C. C. A. Wash.): "If it be conceded that the petition for revision was filed in the wrong court, the appeal, involving as it does only a question of law, may be treated as a petition for revision."

However, the opposite view also has been taken.⁹

Davidson & Co. v. Friedman, 15 A. B. R. 489, 140 Fed. 853 (C. C. A. Ohio): "It is also insisted that we should treat the appeal as a petition for review. These remedies are exclusive of each other and there is no more reason for treating an appeal as a petition for review than there would be for treating an appeal as a writ of error or vice versa."

7. For citations, see ante, §§ 2881, 2887.

8. *Chesapeake Shoe Co. v. Seldner*, 10 A. B. R. 466, 122 Fed. 593 (C. C. A. Va.); *In re Abraham (Bernheimer v. Bryan)*, 2 A. B. R. 266, 93 Fed. 783, reversed by Sup. Ct., on other grounds in 5 A. B. R. 623, 181 U. S. 188. Compare, to similar effect, *In re Russell & Birkett*, 3 A. B. R. 658 (C. C. A. N. Y.); *In re Worcester Co.*, 4 A. B. R.

496, 102 Fed. 808 (C. C. A. Mass.); *Fisher v. Cushman*, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Mass.); *Steiner v. Marshall*, 15 A. B. R. 487, 140 Fed. 710 (C. C. A. Md.); *In re Blair*, 5 A. B. R. 793, 106 Fed. 632 (C. C. A. I. Ter.), *In re Jacobs*, 3 A. B. R. 671, 99 Fed. 539 (C. C. A. Mo.).

9. *Dickas v. Barnes*, 15 A. B. R. 566, 140 Fed. 849 (C. C. A. Ohio).

In any event, the converse is not true; a petition for revision may not be treated as an appeal.

Duryea Power Co. v. Sternburg, 218 U. S. 299, 25 A. B. R. 66: "It is argued that an appeal to the Circuit Court of Appeals may be treated as a petition for revision (*Holden v. Stratton*, 191 U. S. 115, 119, 10 Am. B. R. 786, 48 L. Ed. 115, 118; 24 Sup. Ct. Rep. 45), and that, conversely, a petition for revision may be turned into an appeal, or, at least, treated as one for the purpose of an appeal to this court, if only to establish that the Circuit Court of Appeals exceeded its jurisdiction. There are two answers to this contention. In the first place, the converse proposition does not hold. An appeal opens both fact and law, and therefore might be regarded as intended to raise questions of law in any way that might be deemed proper. But a petition for revision opens only questions of law, and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with the facts."

§ 2917. But Not Where Facts Disputed.—Indeed, at best it is permissible to treat appeals as petitions for revision only where questions of law alone are involved.¹⁰

In *re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.): "As in the case a consideration of the facts is essential to any review of the decision of the court complained of, it is clear that the appeal cannot be treated as a petition for revision, as is suggested by the appellant may be done. That is only permissible where questions of law only are involved."

Francis v. McNeal, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.): "The proceedings before us cannot be treated as a petition of review. It is not confined to matters of law but turns on questions of fact."

§ 2918. Simultaneous Appeal and Petition for Review.—Appeal and petition for review or writ of error may be prosecuted simultaneously to review the same adjudication, where the party is in doubt as to his proper remedy, and the pendency of one will not nullify the other.¹¹

Lockman v. Lang, 12 A. B. R. 497, 128 Fed. 279 (C. C. A. Colo.): "The practice of taking an appeal and a writ of error to review the same adjudication is not only permissible, but commendable, in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court. In such cases the reviewing court will consider both proceedings,

10. In *re Whitener*, 5 A. B. R. 198, 105 Fed. 188 (C. C. A. Tex.); *Steiner v. Marshall*, 15 A. B. R. 487, 140 Fed. 710 (C. C. A. Md.).

11. In *re Worcester Co.*, 4 A. B. R. 496, 102 Fed. 808 (C. C. A. Mass.); In *re Jourdan*, 7 A. B. R. 186, 11 Fed. 726 (C. C. A. Mass.); *Hutchinson v. Leroy*, 8 A. B. R. 21, 113 Fed. 202 (C. C. A. Mass.); In *re Osborne*, 8 A. B. R. 168, 115 Fed. 1 (C. C. A. Mass.); *Osborne v. Perkins*, 7 A. B. R. 250, 112 Fed. 127 (C. C. A. Mass.); *obiter*, impliedly, *Steiner v. Marshall*, 15 A. B. R. 487, 140 Fed. 710 (C. C. A. Md.); instance, *Mason v. Wolkowich*, 17 A. B. R. 714, 150 Fed. 699 (C. C. A. Mass.); instance,

Union Nat. Bk. v. Neill, 17 A. B. R. 853, 841, 149 Fed. 711, 720 (C. C. A. Tex.); instance, *Hendricks v. Webster*, 20 A. B. R. 112, 159 Fed. 927 (C. C. A. Ia.); instance, *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A. Wis.); instance, In *re Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.); In *re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.); *Wells & Co. v. Sharp*, 31 A. B. R. 348, 208 Fed. 393 (C. C. A. S. Dak.); instance, *Shea v. Lewis*, 30 A. B. R. 436, 206 Fed. 877 (C. C. A. Minn.); *contra*, *Davidson v. Friedman*, 15 A. B. R. 490, 140 Fed. 853 (C. C. A. Ohio).

will dismiss that one which is ineffective, and will review the rulings of the court below in accordance with the rules of the method applicable to the nature of the case before it."

Fisher v. Cushman, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Mass.): "Nevertheless * * * the fact that an appeal was taken and a petition also filed does not defeat the right of the party moving this court to have the merits of the controversy adjudicated by us. They do not neutralize each other, and the only result is that the appeal must be dismissed, while the court must proceed to the adjudication of the merits in *Ida C. Fisher, et al., Petitioners*, which petition, on the record before us, involves only a 'matter of law,' as required by § 24b of the Bankrupt Act."

Doubtless the appeal has the precedence, and if appeal will lie, the proper practice would be to dismiss the petition for revision. This is so for the obvious reason that the appeal, if well taken, has already vacated the order, so there is nothing to review.¹²

Impliedly, *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A. Wis.): "Knapp has appealed and has also filed a petition to review and revise. The petition is dismissed, as the matter is properly reviewable on appeal."

If review of the weight of the evidence is desired, the hearing will be upon the appeal.¹³

Hendricks v. Webster, 20 A. B. R. 112, 159 Fed. 927 (C. C. A. Iowa): "James Hendricks appealed from said decree to this court, and also filed an original petition asking for a review of the same. As we are asked to consider evidence in the record, we dismiss the petition for review, and will hear the case upon the appeal."

Coder v. McPherson, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "As the question at issue involves a consideration of the facts disclosed by the evidence, the case will be considered upon the appeal and the petition to revise is dismissed."

§ 2919. Single Assignment of Errors Sufficient Where Appeal and Error Simultaneously Prosecuted.—Where appeal and writ of error are prosecuted simultaneously to review the same alleged errors, a single assignment of errors is all that is necessary.¹⁴

§ 2920. Appeals in "Controversies" Only Allowable in Cases within Act of Congress Establishing Circuit Courts of Appeal.—Appeals in controversies arising in bankruptcy proceedings are allowed in cases that come within the provisions of the act of Congress establishing the circuit court of appeals (26 Stat. 826-828), and only in such cases.¹⁵

12. But compare, *First Nat. Bank of Louisville v. Holt*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.), wherein the court dismissed the appeal (in a "proceeding in bankruptcy") and retained the revision proceedings.

13. In *re Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.).

14. *Lookman v. Lang*, 12 A. B. R. 497, 128 Fed. 279 (C. C. A. Colo.).

15. Inferentially, In *re McKenzie*, 15

A. B. R. 681, 142 Fed. 383 (C. C. A. Ark.); impliedly, *Delta Nat'l Bk. v. Easterbrook*, 13 A. B. R. 340 (C. C. A. Tex.), *Stelling Bros. Co. v. Jones Lumber Co.*, 8 A. B. R. 529, 116 Fed. 261 (C. C. A. Wis.); inferentially, *Walter Scott v. Wilson*, 8 A. B. R. 349, 115 Fed. 284 (C. C. A. Ills.); *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, 28 A. B. R. 207.

In re Columbia Real Estate Co., 7 A. B. R. 441, 112 Fed. 645 (C. C. A. Ind.): "The general provision for appeals, however, is contained in § 24a, which invests the Circuit Court of Appeals 'with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases;' and § 6 of the act creating the Circuit Court of Appeals (26 Stat. 826-828) referred to, confers appellate jurisdiction 'to review by appeal or by writ of error final decisions in the district courts' in all cases other than those which are reviewable by the Supreme Court pursuant to section 5 of the same act. The right to review this order, therefore, rests on the inquiry whether it constitutes a final order or decree, within the meaning of the latter provision, and the general rule is well settled that a denial of the right to intervene is not such final decision, and not appealable."

Impliedly, Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.): "The purpose of Congress in the enactment of the judiciary act of 1891, and the effect accomplished by that law, were to provide an opportunity for a review either in the Supreme Court or in the Circuit Court of Appeals of the final decisions by the Circuit Courts and by the District Courts of all the controversies which they might determine. It was not, in our opinion, the purpose of Congress to strike down any portion of this grant or to impair in any way the appellate jurisdiction thus given by the enactment of the bankruptcy law. On the other hand, the provisions of the Bankrupt Act clearly show that it intended thereby to preserve this jurisdiction over the controversies to which it had already attached in other cases, and to supplement it with the grant of authority to review the decisions of controversies which had not theretofore been within that jurisdiction. Before the passage of the Bankrupt Act the Courts of Appeals had appellate jurisdiction of controversies arising in the Federal courts over the title to and liens upon the property of insolvents who might become bankrupts. Congress provided by § 24a that the Courts of Appeals should still have jurisdiction over those controversies when they arose in bankruptcy proceedings. By § 25a it granted to the Courts of Appeals additional jurisdiction which before the enactment of the bankrupt law they could not exercise, and provided a different time within which this jurisdiction might be invoked, to the end that the proceedings in bankruptcy might not be unduly delayed. But there is nothing in the provisions of § 25a which excludes, revokes, or diminishes the general appellate jurisdiction granted by the previous section over controversies within the jurisdiction of the Courts of Appeals before the bankruptcy law was passed. The extent of its effect is to grant some additional jurisdiction, and to restrict to 10 days the time which the jurisdiction of the Court of Appeals may be invoked in the three classes of cases there specified.

"Nor is there anything in the grant by § 24b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy which in any way affects or limits the general appellate jurisdiction vested by the sections of the law which have been considered. The act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right of revision in matter of law. It grants the right of appeal and the right of superintendence and revision in matter of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked."

§ 2920½. Amount Not Limited.—Appeals in "controversies," under § 24 (a) are not limited in amount.¹⁶

16. In re Gold, 31 A. B. R. 18, 210 Fed. 410 (C. C. A. Ills.).

§ 2921. Decree in Equity Not Reviewable by Writ of Error, nor Judgment at Law by Appeal.—In controversies arising in bankruptcy proceedings, a decree in equity cannot be reviewed on the facts by writ of error nor a judgment at law by appeal.¹⁷

Thus, actions at law to recover specific personal property preferentially conveyed are not appealable, but reviewable only by writ of error.¹⁸

Conversely, suits in equity to set aside fraudulent or preferential transfers are appealable,^{18a} and not reviewable by writ of error.¹⁹

§ 2922. Must Be "Final" Order.—But the order sought to be appealed from must be a final order.

Thus, the dismissal of a petition for intervention to contest an adjudication, filed, not by a creditor, but by a mere lienholder, is not a final order on the merits and not appealable;²⁰ nor are interlocutory orders (injunction) in plenary suits by trustees.²¹

Mere orders of confirmation or disapproval of referees' or masters' reports are not final, and hence not appealable.²²

Walter Scott & Co. v. Wilson, 8 A. B. R. 349, 115 Fed. 284 (C. C. A. Ills.): "We are, however, of opinion that the appeal is premature. There was no final decree from which an appeal could be taken. The order complained of is not a final decree adjudging the appellant's right and dismissing its bill or petition. It simply overrules the exceptions to the master's report and approves of the report. It neither determines the appellant's right nor disposes of its suit. It still remains within the power of the court below to set aside that report, to refer the case, and to direct further evidence to be taken. 'A confirmed report, at best, stands in the same relation to a decree as a verdict to a judgment. It may be almost certain that the decree will follow it, but it cannot be enforced until the decree is entered.' *Kingsbury v. Kingsbury*, 20 Mich. 212."

An "order to show cause" is in the nature of process, being merely the means prescribed by law for bringing the defendant into court to answer the plaintiff's demands; and, in jurisdictions where even interlocutory orders are made appealable if they affect substantial rights, it has been held

17. *Delta Nat'l Bank v. Easterbrook*, 13 A. B. R. 340 (C. C. A. Tex.), citing the following cases, *Muhlenberg County v. Dyer*, 65 Fed. 634; *City of Wilmington v. Ricand*, 90 Fed. 213; *DeLemos v. U. S.*, 107 Fed. 127; *Highland Boy Min. Co. v. Strickley*, 116 Fed. 855. But compare, *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.).

18. *Delta Nat'l Bk. v. Easterbrook*, 13 A. B. R. 340 (C. C. A. Tex.).

18a. In re *Jacobs*, 3 A. B. R. 671, 99 Fed. 539 (C. C. A. Mo.).

19. *Delta Nat. Bk. v. Easterbrooks*, 13 A. B. R. 340 (C. C. A. Tex.); compare, for distinction between appeal and writ of error in controversies arising

out of bankruptcy, *Duncan v. Landis*, 5 A. B. R. 649, 106 Fed. 839 (C. C. A. Pa.). Trials without jury: Findings were not reviewable under the law of 1867. *Packer v. Whit*, 1 A. B. R. 621 (C. C. A. Mass.).

20. In re *Columbia Real Estate Co.*, 7 A. B. R. 441, 112 Fed. 645 (C. C. A. Ind.). Compare, analogously (appeal in bankruptcy proceedings proper), *Goodman v. Brenner*, 6 A. B. R. 470, 109 Fed. 481 (C. C. A. La.).

21. *Doroshov v. Ott*, 14 A. B. R. 34, 134 Fed. 740 (C. C. A. N. J.).

22. *Ragan v. Cotton & Preston*, 28 A. B. R. 246, 200 Fed. 516 (C. C. A. Ga.).

that an order to show cause is not appealable.²³

§ 2923. Validity, Priority, etc., of Liens Appealable as "Controversies."—Judgments determining the extent, validity or priority of mortgages or other alleged liens on the bankrupt's assets, are "controversies arising in bankruptcy proceedings," and are appealable.²⁴

Century Savings Bank v. Moody & Son, 31 A. B. R. 586, 209 Fed. 775 (C. C. A. Iowa): "The following conclusions may be drawn from the decisions of the Supreme Court. The presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings * * * In none of the cases, however, has it been held that there cannot be an independent assertion of the lien alone so as to create a controversy appealable under § 24a."

Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.): "A judgment of a court of bankruptcy that a chattel mortgage upon the alleged property of the bankrupt is voidable by his trustee, that it entitles the mortgagee to no lien upon the property, and to no preference in payment out of its proceeds, is a final decision of a controversy arising in bankruptcy proceedings, of which the Circuit Court of Appeals would have had appellate jurisdiction if it had arisen in any other case in a Federal Court, and the decision may be reviewed by appeal."

Likewise are controversies over dower rights²⁵ and other interests in property.

And they are appealable, although the lien be incident to a debt, the debt itself not being disputed and hence not appealable under Bankr. Act, § 25 (a).²⁶

§ 2924. Summary Order on Third Party to Surrender Assets, Appealable as "Controversy."—A summary order on the trustee's application, requiring a third party to surrender property which previously such third party had persuaded the bankruptcy receiver voluntarily to turn over

²³. *Morehouse v. (Pacific) Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

²⁴. In *re National Bank*, 14 A. B. R. 180, 135 Fed. 62 (C. C. A. Ohio); *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio); instance, In *re Soudans Mfg. Co.*, 8 A. B. R. 45, 113 Fed. 806 (C. C. A. Ind.); *Liddon & Bro. v. Smith*, 14 A. B. R. 204, 135 Fed. 43 (C. C. A. Fla.); In *re Holmes*, 15 A. B. R. 689, 142 Fed. 391 (C. C. A. Colo.); In *re Standard Tel. & Elec. Co. (Knapp v. Milwaukee Tr. Co.)*, 20 A. B. R. 671, 162 Fed. 675, quoted at § 2875, and on other points at § 2969.

Instance, mortgagee's attorney denied lien though claim allowed as unsecured debt, In *re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.). Instance, In *re Roche*,

4 A. B. R. 369, 101 Fed. 956 (C. C. A. Tex.): Mortgagee's attorney denied fee as part of lien where mortgage not foreclosed but property sold by trustee in bankruptcy "clear and free." Also, see *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.).

Instance, mortgagee filing answer to trustee's petition to sell free and clear of encumbrances, despite being between lien holders. *Century Savings Bank v. Moody & Son*, 31 A. B. R. 586, 200 Fed. 775 (C. C. A. Iowa).

²⁵. *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.).

²⁶. *Hutchinson v. Otis*, 10 A. B. R. 275, 123 Fed. 14 (C. C. A. Mass.); instance, *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio).

to him, is an order in a "controversy," and is appealable under § 24 (a).²⁷

Similarly, summary orders on purchasers at judicial sales and others having possession of the purchase price, are appealable under § 24 (a).²⁸

§ 2925. Likewise, Summary Order on Trustee or Receiver to Surrender Assets to Third Party.—Likewise, an order on the petition of a third party claiming ownership of goods in the hands of the trustee or receiver, is such a "controversy" and is appealable under § 24 (a).²⁹

§ 2926. Plenary Suits in United States District Courts by Adverse Claimants in Possession to Enjoin Trustees, Appealable as "Controversies."—Plenary suits in the United States District Courts in bankruptcy, brought by adverse claimants in possession of the property involved, to enjoin the trustee from interfering therewith, are "controversies arising in bankruptcy proceedings," and not proceedings in bankruptcy proper, and are appealable under § 24 (a) of the Act.³⁰

§ 2927. Also, Plenary Suits by Trustees in United States District Court to Recover Property Preferentially or Fraudulently Transferred.—And plenary suits brought by trustees in United States District Courts under favor of the amendment of 1903 to §§ 60 (b), 67 (e) and 70 (e), to recover or set aside preferential or fraudulent transfers, are appealable under § 24 (a).³¹

McCarty v. Coffin, 18 A. B. R. 148, 150 Fed. 307 (C. C. A. Tex.): "The foregoing statement of the allegations of the petition which began this suit shows it to be in substance one to cancel the title held by McCarty, and to decree that the title was in Coffin as trustee. The petition is variously called by the parties in the subsequent proceedings a motion, a summary proceeding, and a bill. It is not written with that technical skill and proper formality usually found in a bill to cancel an adverse conveyance and to vest title in the complainant, but we find in the pleading all the necessary averments, and it concludes, if not with the usual prayer, by asking the court to grant the relief sought. The suit raises a distinct and separable issue, and is one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals have appellate jurisdiction under § 24a of the Bankruptcy Act of 1898. * * * The case does not fall within § 25a, which relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings."

²⁷. *Hinds v. Moore*, 14 A. B. R. 1, 134 Fed. 221 (C. C. A. Tenn., reversing *In re Leeds Woolen Mills*, 12 A. B. R. 136, 129 Fed. 922).

²⁸. *Mason v. Wolkowich*, 17 A. B. R. 717, 150 Fed. 699 (C. C. A. Mass.).

²⁹. Compare ante, § 2875. *Walter Scott & Co. v. Wilson*, 8 A. B. R. 349, 115 Fed. 284 (C. C. A.); instance, *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 A. B. R. 633; *Smith v. Evans*, 17 A. B. R. 433, 148 Fed. 89 (C. C. A. Ills.); *Hewitt v. Berlin Machine Co.*, 11 A. B. R. 708, 194 U. S. 296; *Franklin v. Stoughton Wagon Co.*, 22 A. B. R. 63, 168 Fed. 857 (C. C. A. Okla.).

Reclaiming goods bought on fraudulent misrepresentation by bankrupt. *In re Gold*, 31 A. B. R. 18, 210 Fed. 410 (C. C. A. Ills.).

Reclamation petition by conditional vendor. *Baker Ice Mach. Co. v. Bailey*, 31 A. B. R. 513, 209 Fed. 603 (C. C. A. Kan.).

³⁰. *Warehousing Co. v. Hand*, 16 A. B. R. 56, 143 Fed. 32 (C. C. A. Wis.). See ante, § 2875.

³¹. Instance, *Rogers v. Page*, 15 A. B. R. 502, 140 Fed. 596 (C. C. A. Tenn.); *Haffenberg v. Chicago Title & Trust Co.*, 27 A. B. R. 708, 192 Fed. 374 (C. C. A. Ills.). See ante, § 2874.

DIVISION 2.

REVIEW AND ERROR PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS.

SUBDIVISION "A"

REVIEW AND ERROR PROCEEDINGS IN BANKRUPTCY PROCEEDINGS PROPER.

§ 2928. **Petition to Revise Sole Method of Review in Bankruptcy Proceedings Proper, Except in Three Cases of § 25 (a).**—Petition for review is the method, and the exclusive method, of reviewing erroneous orders made in bankruptcy proceedings proper, where the right of appeal therefrom is not expressly conferred by the bankruptcy act itself in § 25 (a); and it is exercisable under § 24 (b).³²

Fisher v. Cushman, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Mass.): "The appeal will not lie because the subject thereof is not within the three specifications of the matters of appeal found in § 25 of the Bankrupt Act."

§ 2929. **Limited Matters of Law under § 24 (b).**—And the circuit court of appeals is limited to matters of law therein.³³

§ 2930. **Thus, Exemptions Reviewable Only by Petition to Revise.**—Thus, the allowance or disallowance of claims for exemptions and orders in relation to setting them apart, are proceedings in bankruptcy proper, but are not appealable, because not within any of the three classes of § 25, and are reviewable by petition to revise and not otherwise.³⁴

32. *Holden v. Stratton*, 191 U. S. 115, 10 A. B. R. 788, quoted ante, § 2911. *Ingram v. Wilson*, 11 A. B. R. 194, 125 Fed. 913 (C. C. A. Iowa), quoted ante, § 2911; *Rode & Horn v. Phipps*, 27 A. B. R. 827, 195 Fed. 414 (C. C. A. Tenn.). Apparently contra, *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa).

Section 24 (b) has no application to the territorial courts. *In re Stumpf*, 4 A. B. R. 267, 9 Okla. 639.

33. *In re O'Connell*, 14 A. B. R. 238, 137 Fed. 838 (C. C. A. Mass.).

In re Leech, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.); *Landry v. San Antonio Brew. Ass'n*, 20 A. B. R. 226, 159 Fed. 708 (C. C. A. Tex.); *In re Holden*, 29 A. B. R. 387, 203 Fed. 229 (C. C. A. Mich.); *In re Witherbee*, 30 A. B. R. 314, 202 Fed. 896 (C. C. A. Me.); *In re Smith*, 29 A. B. R. 628, 203 Fed. 369 (C. C. A. Mich.); *Stuart v. Reynolds*, 29 A. B. R. 412, 204 Fed. 709 (C. C. A. Ala.); *In re Knosher & Co.*, 28 A. B. R. 747, 197 Fed. 136 (C. C. A. Wash.); allowance of a secured claim; *In re Roger Brown & Co.*, 28 A. B. R. 336, 196 Fed. 758 (C. C. A. Iowa).

Compare similar ruling as to peti-

tions for revision in controversies arising in bankruptcy proceedings, post, § 2940, et seq.

Agreed statement of facts, in controversy as to which referee should take charge of the bankruptcy. *In re Judkins Co.*, 30 A. B. R. 529, 205 Fed. 892 (C. C. A. Mass.).

And only such as are necessarily involved in the order may be considered. *Williamson v. Richardson*, 30 A. B. R. 559, 305 Fed. 245 (C. C. A. Calif.).

34. *Holden v. Stratton*, 191 U. S. 115, 10 A. B. R. 788, quoted ante, § 2911; *Holden v. Stratton*, 198 U. S. 202, 14 A. B. R. 94; *Ingram v. Wilson*, 11 A. B. R. 194, 125 Fed. 913 (C. C. A. Iowa); *Steiner v. Marshall*, 15 A. B. R. 487, 140 Fed. 710 (C. C. A. Md.); instance, *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa.); instance, *In re Kane*, 11 A. B. R. 533, 127 Fed. 552 (C. C. A. Ills.); instance, *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 99 (C. C. A. Colo.); instance, *Hall & Kaul Co. v. Friday*, 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa.); inferentially, *In re Goodman*, 23 A. B. R. 504, 174, Fed. 644 (C. C. A. Ala.). Compare,

They are reviewable under § 24 (b) and only thus.³⁵

§ 2931. Likewise, Reopening or Refusal to Reopen Closed Estates.—Thus, an order reopening or refusing to reopen an estate once closed is not reviewable by appeal, but only by petition to revise.³⁶

§ 2932. Administrative Orders Reviewable under § 24 (b).—Such orders of the bankruptcy courts as relate merely to the administration of the estate are revisable by petition to review under § 24 (b).³⁷

Thus, objections to a trustee's report, seeking to charge him with assets coming into his possession but not accounted for, raise questions which the bankruptcy court may summarily determine, and its determination is reviewable by petition to revise under § 24 (b), and only thus.³⁸

§ 2933-4. Attorneys' Fees and Other Expenses of Administration.—Allowances of attorneys' fees and other expenses of administration,³⁹ are reviewable under § 24 (b), and only thus.

Thus, as to claims of creditors for reimbursement of attorneys' fees and other expenses in recovering assets for the benefit of the estate.⁴⁰

§ 2935. Orders on Nonbankrupt Partners to File Schedules or Surrender Firm Assets.—Orders upon individual members of a bankrupt partnership, themselves not adjudged bankrupt, to file schedules of their individual property and debts, and to surrender their property to the partnership trustee for administration, are reviewable under § 24 (b);⁴² and so, also, are orders to surrender assets belonging to the bankrupt partnership estate.⁴³

§ 2936. Likewise, Distribution between Firm and Individual Creditors.—Likewise, questions of distribution between firm and individual creditors in partnership bankruptcies, are thus reviewable.⁴⁴

to same effect, §§ 2866, 2906. But compare, apparently contra, *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa).

35. *Davidson v. Ferguson-McKinney Co.*, 18 A. B. R. 156, 150 Fed. 269 (C. C. A. Tex.).

36. *In re O'Connell*, 14 A. B. R. 237, 137 Fed. 838 (C. C. A. Mass.); *Johansen, etc., Co. v. Alles*, 28 A. B. R. 299, 197 Fed. 274 (C. C. A. Mo.).

37. *Dickas v. Barnes*, 15 A. B. R. 570, 140 Fed. 849 (C. C. A. Ohio); impliedly, *Davidson v. Ferguson-McKinney Co.*, 18 A. B. R. 156, 150 Fed. 269 (C. C. A. Tex.). See ante, § 2868. Also see cases cited in next paragraph following.

Selection of Referee to Take Charge of Bankruptcy.—As to referee to whom a particular bankruptcy should be referred. *In re Judkins Co.*, 30 A. B.

R. 529, 205 Fed. 892 (C. C. A. Mass.).

38. *In re Moore & Bridgeman*, 21 A. B. R. 651, 166 Fed. 689 (C. C. A. Tex.).

39. *Davidson v. Friedman*, 15 A. B. R. 490, 140 Fed. 853 (C. C. A. Mich.); *Ohio Valley Banking Co. v. Switzer*, 18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio); instance, *In re Irwin*, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.).

40. *Ohio Valley Bk. Co. v. Switzer*, 18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio).

42. *Dickas v. Barnes*, 15 A. B. R. 570, 140 Fed. 849 (C. C. A. Ohio). Compare, analogously, on germane proposition, *Francis v. McNeal*, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.).

43. *In re Mertens*, 15 A. B. R. 702, 142 Fed. 445 (C. C. A. N. Y.).

44. *Euclid Nat'l Bank v. Union Trust Co.*, 17 A. B. R. 834, 149 Fed. 975 (C. C. A. W. Va.).

§ 2937. **Also, Orders of Sale and Controversies Incident Thereto, Reviewable under § 24 (b).**—Also, orders of sale and controversies incident thereto are proceedings in bankruptcy proper, and reviewable only under § 24 (b);⁴⁵ such as orders of distribution of the proceeds of a trustee's sale.⁴⁶

But, in such cases, on reason it would seem that, following the principle of *Hutchinson v. Otis*, 109 U. S. 552, 10 A. B. R. 135, there must be a controversy over the order to sell, and not solely over the incidental matter of a lien.

§ 2938. **And Summary Orders on Bankrupts and Others to Surrender Assets or Execute Instruments.**—A summary order on the bankrupt to surrender assets to the trustee is reviewable only under § 24 (b).⁴⁷

Samel v. Dodd, 16 A. B. R. 165, 142 Fed. 68 (C. C. A. Ga.): "The following propositions seem to be settled law: (1) In proceedings like the present (summary orders on bankrupts to surrender assets) the Court of Appeals may superintend and revise the action of the District Court only in matters of law."

Likewise, a summary order on the bankrupt to assign property or execute instruments, to aid the trustee in collecting in the assets, is reviewable only by petition to revise, not by appeal. Also it is held that a summary order on a nonbankrupt member of a bankrupt firm to surrender a policy of insurance is a step in bankruptcy proceedings proper, reviewable only by petition for revision under § 24 (b).⁴⁸ Again, a summary order on a third party—an adverse claimant in possession, who was erroneously held to have waived objections to the jurisdiction and to have consented—is reviewable only by petition to revise, not by appeal.⁴⁹ Similarly, a sum-

45. *Coal City, etc., Co. v. Hogue*, 28 A. B. R. 258, 197 Fed. 1 (C. C. A. W. Va.); *Bank v. Title & Trust Co.*, 198 U. S. 280, 14 A. B. R. 102; *In re McMahon*, 17 A. B. R. 537, 149 Fed. 684 (C. C. A. Ohio), being an instance of a trust deed on property, alleged to be fraudulent under § 67 (e). See ante, §§ 2870 and 2876.

Restraining Orders Issued in Bankruptcy Proceedings to Enjoin Disposition of Alleged Undisclosed Assets.—An order refusing an injunction to restrain the disposition of alleged undisclosed assets, where the injunction was asked for by the assignee of a proved claim, not guilty of laches, in an estate where the appointment of a trustee had originally been dispensed with for want of assets and absence of creditors, is reviewable under § 24 (b) and such petitioner is a party aggrieved. *Clark v. Pidcock*, 12 A. B. R. 309, 129 Fed. 745 (C. C. A. N. J.).

46. *In re Groetzinger & Sons*, 11 A. B. R. 467, 127 Fed. 124 (C. C. A.).

47. See ante, § 2873. *Schweer v. Brown*, 195 U. S. 171, 12 A. B. R. 673; *Instance, In re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); *instance, In re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.).

In re Walsh Bros., 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa); *instance, Loveless v. Southern Grocer Co.*, 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.); *instance, Lesiaus v. Goodman*, 21 A. B. R. 446, 165 Fed. 889 (C. C. A. Pa.); *instance, In re Frank*, 25 A. B. R. 486, 182 Fed. 794 (C. C. A. N. D.).

Apparently contra, where facts are in dispute, it is reviewable, if at all, only on appeal. *Ellis v. Krulewitch*, 15 A. B. R. 615, 141 Fed. 954 (C. C. A.).

48. *In re Mertens*, 15 A. B. R. 701, 142 Fed. 445 (C. C. A. N. Y.); *Fisher v. Cushman*, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Mass.).

49. *Bank v. Title & Trust Co.*, 198 U. S. 280, 14 A. B. R. 102, reversing 11 A. B. R. 79.

mary order upon a third person to return property which he has taken from the custody of the receiver or trustee in bankruptcy is not reviewable by appeal under § 25 (a), but only by petition to revise.⁵⁰

§ 2939. Allowances to Widow and Children on Death of Bankrupt Pending Adjudication.—It is doubtful whether the allowances to the widow and children under § 8 on the death of the bankrupt are to be considered bankruptcy proceedings proper or controversies arising therein, but it has been held (in a jurisdiction holding that §§ 24 (a) and 24 (b) are not exclusive of each other)⁵¹ that in either event they are reviewable by petition to revise where the facts are undisputed.⁵²

§ 2939½ Surrender of Preferences.—Orders disallowing preferred claims for failing to surrender preferences may be reviewed by petition to revise,⁵³ although, as noted at § 2909, they are also appealable.

Summary orders on assignees to surrender property where assignments for the benefits of creditors are void, are reviewable only by petitions to revise under § 24b.

In re Farrell, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio): "Thus the remedy for coming into this court upon complaint made against allowance or refusal of a summary order is, we think, reducible to petition to review in matter of law, according to subdivision b, § 24, of the Bankruptcy Act."

SUBDIVISION "B."

ERROR PROCEEDINGS IN CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS AND IN INDEPENDENT SUITS BY TRUSTEES IN U. S. DISTRICT COURTS.

§ 2940. Error Proceedings in "Controversies" and in Independent Plenary Suits.—Error proceedings, as distinguished from appeals, may be taken in the circuit court of appeals, in controversies arising in bankruptcy proceedings, as distinguished from bankruptcy proceedings themselves, and in independent plenary suits, from courts of bankruptcy in instances where error proceedings in similar cases would lie.⁵⁴

50. In re Rose Shoe Mfg. Co., 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.).

51. Compare ante, §§ 2881, 2883, 2887, and 2915.

52. In re McKenzie, 15 A. B. R. 681, 142 Fed. 383 (C. C. A. Ark.).

53. First Nat. Bk. of Louisville v. Holt, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.), quoted at § 2888. Where, however, the order sought to be reviewed was an exercise of discretion in refusing to ratify an agreement to suppress criminal prosecution as consideration for the return of the preference, it is not reviewable on petition to revise. Mulford v. Fourth St. Nat.

Bank, 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

54. Bankr. Act, § 24 (b): "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

Bankr. Act, § 24 (a): "The Supreme Court of the United States, the circuit courts of appeals of the United States and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held,

§ 2941. Whether § 24 Applies Only to Orders in Proceedings in Bankruptcy Themselves, Not to Orders in Independent Plenary Suits.—Whether § 24 applies only to orders made in the proceedings themselves—whether in “bankruptcy proceedings” proper or in mere “controversies arising in bankruptcy proceedings”—and does not refer to independent plenary suits brought by trustees to recover property in the U. S. District Courts, under favor of the amendment of 1903 or by consent, does not seem to be clear. It has apparently been held that it does not refer to independent suits.⁵⁵

In *re Jacobs*, 3 A. B. R. 671, 99 Fed. 539 (C. C. A. Mo.): “In view of these adjudications upon the Bankrupt Act of 1867, we feel constrained to hold that it is only some action taken or order made in the bankruptcy proceeding itself which can be reviewed by an original petition addressed to this court, under subdivision ‘b’ of § 24 of the Bankrupt Act, and that the power thereby conferred ‘to superintend and revise’ the action of the District Court does not extend to suits brought in that court by the trustee in bankruptcy against third parties, to collect the assets of the estate, or to suits brought by third parties against the trustee, whether such suits are rightfully or wrongfully brought in that court, as to which point we express no opinion at this time. Such suits as those last referred to, whether at law or in equity, are not proceedings in bankruptcy, or ‘controversies arising in bankruptcy proceedings,’ within the meaning and intent of the law authorizing petitions for review, but they are suits which must be reviewed in the ordinary way, by appeal or writ of error, when they have reached a final determination in the court of first instance. We can discover nothing in the language or policy of the recent Bankrupt Act which would seem to require the various Circuit Courts of Appeals to review every interlocutory order made or proceeding taken in an ordinary action at law or in equity, in a suit between a trustee in bankruptcy and a third party, which happens to be brought in the District Court, simply because the trustee’s title to the property claimed, or his liability to be sued, is founded on the Bankrupt Act. Nor do we believe that such a construction of the act was within the contemplation of Congress.”

In *re Rusch*, 8 A. B. R. 518, 116 Fed. 270 (C. C. A. Wis.): “By § 24 (a) of the Bankrupt Act, the Circuit Courts of Appeals are given ‘appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.’ By subdivision ‘b’ of that section such courts are given jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. This revisory power is like to that conferred upon Circuit Courts under the Bankruptcy Act of 1867. Under that act it was ruled that the jurisdiction thus conferred upon the Circuit Courts was dual in character:

are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme

court of the District of Columbia.”

⁵⁵ Compare, In *re Antigo Screen Door Co.*, 10 A. B. R. 362, 123 Fed. 249 (C. C. A. Wis.), where the same court that decided In *re Rusch*, 8 A. B. R. 518, 116 Fed. 270 (C. C. A. Wis.), and In *re Jacobs*, 3 A. B. R. 671, 99 Fed. 539 (C. C. A. Mo.), held, that if actual possession were surrendered to the court it would have jurisdiction.

"First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets among the creditors, and the discharge, or refusal of a discharge, of the bankrupt; secondly, jurisdiction as an ordinary court of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him.' * * *

"This rule is applicable to the grant of jurisdiction under the present Bankruptcy Act. It follows that the power to revise by original petition here the ruling of the bankruptcy court extends only to some order made in the bankruptcy proceedings proper, and does not embrace proceedings in suits brought by the trustee in bankruptcy against third parties. * * * We hold in the opinion in the principal case, herewith decided * * * that the proceeding below was not 'a proceeding in bankruptcy,' but was in the nature of an independent suit by the trustee, which could have been maintained equally in a State court. * * * And was maintainable in the bankruptcy court as a plenary suit, and only because of the submission of the G. W. Jones Lumber Company to its jurisdiction."

Doroshov v. Ott, 14 A. B. R. 39, 134 Fed. 740 (C. C. A. N. J.): "We have no difficulty in saying that the petitioner, in the case at bar, has not presented a matter reviewable in this court under § 24b of the bankrupt law. The suit brought by the trustee against the petitioner in the District Court, was specially authorized by the amendment of the Bankrupt Act of 1903, above referred to. It is true, the District Court was the court of bankruptcy having jurisdiction of the bankrupt's estate, which the complainant, as trustee, was administering, but the suit in equity instituted by him was none the less an independent suit, and incapable of being characterized as a proceeding in bankruptcy, within the meaning of § 24b of the Bankrupt Act. We cannot here and now, upon this petition, consider the specifications of error made by the petitioner to the interlocutory decree of that court. The orders and decrees of the District Court in that suit, whether interlocutory or final, can only be reviewed in this court upon appeal regularly taken."

But, again, it has been held that it does include independent plenary suits.

Delta Nat'l Bk. v. Easterbrook, 13 A. B. R. 340, 133 Fed. 521 (C. C. A. Tex.): "In the lower court this was an action at law for the specific recovery of personal property, and was a controversy arising in bankruptcy proceedings, of which the lower court had jurisdiction under § 70e. * * * From the final judgment rendered in the case no appeal lies under § 25 * * * and, if this court has jurisdiction to review the same, the authority must be found under § 24a * * * and in the appellate jurisdiction of the Circuit Courts of Appeals as granted by the Act of 1891, which jurisdiction is not restricted by the Bankruptcy Law; and therefore decrees in equity and judgments at law, although in controversies arising in bankruptcy proceedings, may be revised by this court."

It would seem, perhaps, that it refers to the review of the action of the court in charge of the bankruptcy case as to orders made in the course of the proceedings, rather than to independent suits by trustees. These independent suits by trustees, wherever brought, whether in the state courts, or under favor of the amendment of 1903 in the U. S. District Courts in bankruptcy, follow the course of procedure of the forum. The distinction, however, is academic, since the procedure would be the same whether under § 24 or under the general law.

§ 2942. Section 24 (b) Authorizes Review Only of Law, Not Facts.—Section 24 (b) refers only to revision in matters of law and not fact: the circuit court of appeals will revise the action of the district court under § 24 (b) only on questions of law, not on questions of fact.⁵⁶

Elliott v. Toepfner, 187 U. S. 327, 9 A. B. R. 56: "Section 24 (b) * * * is confined to questions of law and does not contemplate a review of the facts."

In re Taft, 13 A. B. R. 419, 133 Fed. 511 (C. C. A. Ohio): "Inasmuch as our jurisdiction to review the orders of the bankrupt courts, under § 24b of the Bankrupt Act of 1898, does not extend to any review of a finding or conclusion of fact, but is limited to a review of decisions of law made by the District Court it becomes essential that we shall have presented to us, by such a petition for review, specific decisions of law made by the lower court by which the petitioners are aggrieved."

In re Grassler & Reichwald, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.): "It was intended thereby to provide a summary method for revising the orders and decisions of courts of bankruptcy upon questions of law, and the section does not contemplate any review of the facts."

Printing Co. v. Brewing Co., 4 A. B. R. 183, 101 Fed. 700 (C. C. A. Ky.): "Two modes of reviewing the decisions and orders of the District Court in bankrupt proceedings are provided by the Bankrupt Act. The first is that found in § 24b of the act. * * *

"The superintending and revising authority granted by the twenty-fourth section was evidently intended to provide a summary way for reviewing the orders and decisions of the bankrupt courts upon questions of law, and does not contemplate any review of the facts. Under § 25, a review of both questions of fact and law is contemplated. Under § 24, the jurisdiction is not exercised under an appeal, but upon an original petition filed in this court by any person aggrieved by the decision or order complained of. This differentiation of the modes of redress provided by the two sections seems altogether conformable to the language employed, and is the interpretation announced by the Circuit Court of Appeals for the Seventh Circuit."

In re Throckmorton, 17 A. B. R. 856 (C. C. A. Ohio): "Obviously our jurisdiction is restricted to matters of law, and the legal questions we can examine are only those which arise out of the facts found or conceded."

⁵⁶. See ante, § 2882. *In re Whitener*, 3 A. B. R. 198, 105 Fed. 180 (C. C. A. Tex.); *In re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.); *In re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.); *In re Rouse, Hazard & Co.*, 1 A. B. R. 234, 91 Fed. 96 (C. C. A. Ills.); *In re Holmes*, 15 A. B. R. 693, 142 Fed. 391 (C. C. A. Colo.), quoted ante, § 2883; *Mueller v. Nugent*, 7 A. B. R. 224, 184 U. S. 9; *Bank v. Chicago Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280, quoted ante; *Loan & Trust Co.*, 14 A. B. R. 313, 135 Fed. 717 (C. C. A. W. Va.).

Matter of Loving, 224 U. S. 183, 27 A. B. R. 852; *Lesaius v. Goodman*, 21 A. B. R. 446, 165 Fed. 889 (C. C. A. Pa.); *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.); *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.); *Impliedly*, *In re Irwin*, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.); *In re Witherbee*, 30 A. B. R. 314, 202 Fed. 896 (C. C. A. Me.); *Williamson v. Richardsom*, 30 A. B. R. 559, 205 Fed. 245 (C. C. A. Calif.); *In re Blum*, 29 A. B. R. 332, 202 Fed. 883 (C. C. A. Wis.); *Kirsner v. Taliaferro*, 29 A. B. R. 832, 202 Fed. 51 (C. C. A. Va.); *In re Zinner*, 29 A. B. R. 860, 202 Fed. 197 (C. C. A. Ill.); *In re Smith*, 29 A. B. R. 628, 203 Fed. 369 (C. C. A. Mich.); *In re Holden*, 29 A. B. R. 387, 203 Fed. 229 (C. C. A. Mich.); *Stuart v. Reynolds*, 29 A. B. R. 412, 204 Fed. 709 (C. C. A. Ala.); *Barnes v. Pampel*, 27 A. B. R. 192, 192 Fed. 525 (C. C. A. Ohio). Similarly as to bankruptcy proceedings proper. *In re O'Connell*, 14 A. B. R. 238, 137 Fed. 838 (C. C. A. Mass.).

In re Purvine, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.): "This court only revises the action of the District Court in matters of law. Bankruptcy Act 1898, §§ 24, 24b.

"The facts are for the District Court. The judge presiding in that court found that Purvine had the money in his possession and control, and there was ample evidence to support such finding; so the sole question here is one of the power of the District Court to order a bankrupt having money in his possession, belonging to the bankrupt estate, to turn the same over to the trustee, and to punish as for contempt the failure to do so."

Landry v. San Antonio Brew. Ass'n, 20 A. B. R. 226, 159 Fed. 700 (C. C. A. Tex.): "We find in the transcript neither an agreed statement of facts, a finding of facts by the judge, nor even a summary of the evidence. Petitions to this court for superintendence and revision are restricted to questions of law. Therefore this petition is denied."

And the circuit court of appeals will look no further into the facts, as found by the district court, than to ascertain whether they are supported by the evidence.⁵⁷ Matters of discretion, where there is no abuse of discretion alleged, will not be reviewed.⁵⁸

And where the record does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his findings and order, and only matters of law apparent upon the face of the record may be considered;⁵⁹ likewise, where it contains "substantially" all the evidence but not "all" the evidence.⁶⁰

§ 2943. Intervening Petitions Claiming Property or Funds in Custody of Bankruptcy Court or Claiming Liens or Other Interests Therein Reviewable by Petition to Revise.—Thus, in jurisdictions holding that resort to appeal or petition to revise is optional in a proper case, controversies instituted by intervening petitions claiming property or funds in the custody of the bankruptcy court or claiming liens thereon or other interests therein, are reviewable by petition to revise, where the facts are found or not disputed.⁶¹

§ 2943½. Thus, Summary Orders on State Court Officers or Other Third Parties to Surrender Assets.—Thus, in jurisdictions where the holding is that resort to appeal or petition to revise is optional in a proper case, it is held that summary orders on state court officers or other third parties to surrender assets are reviewable by petition to revise, where merely review of law is involved.⁶²

In re Hecox, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.): "As the case

57. Cases cited, supra.

58. Mulford v. Fourth St. Nat'l Bk., 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

59. In re Baum, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.).

60. Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.). See post, § 2953.

61. Compare ante, §§ 2881, 2883, 2887, 2915. Hutchinson v. LeRoy, 8 A. B. R. 20, 113 Fed. 200 (C. C. A. Mass.); instance, Ross v. Stroh, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.). But compare, In re Doran, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

62. Compare ante, §§ 2881, 2883, 2887 and 2915.

at bar is that of a petition for a summary order on the receiver to deliver property to the trustee in bankruptcy, which order was refused by the District Court solely on a question of law, the case is one presenting a controversy 'arising in bankruptcy' under § 24b of the Bankrupt Act, and is reviewable in matter of law."

DIVISION 3.

PROCEDURE ON APPEAL AND ON PETITIONS FOR REVISION TO THE CIRCUIT COURT OF APPEALS.

§ 2944. **Brief Resume.**—The Bankruptcy Act, in brief, provides two different methods of reviewing in the circuit court of appeals judgments and orders of the district courts in bankruptcy; one, by petition for revision, which brings up only matters of law and which is not available to review erroneous findings of facts; the other, by appeal, which brings up both law and fact. In all instances of review, whether by way of petition for revision or by way of appeal, whether in bankruptcy proceedings proper or in controversies arising in bankruptcy proceedings or independent suits by trustees in bankruptcy in the district court, the right to exercise the particular method of review adopted, and the practice and procedure in exercising it, follow the usual course of equity practice in the federal courts; save and except that, in bankruptcy proceedings proper, appeal is available only in the three instances of § 25, namely, adjudications of bankruptcy, discharges and allowances and rejections of claims, and in those three instances is the only available method of review; and that method is to be pursued in accordance with the peculiar provisions of the Bankruptcy Act, and the rules and general orders made in pursuance thereof; whilst in all other instances of bankruptcy proceedings proper, review may be had only by petition for revision.⁶³

SUBDIVISION "A."

PROCEDURE ON ERROR PROCEEDINGS OR PETITION FOR REVISION.

§ 2945. **Procedure on Error to Be by Writ of Error or Petition to Revise, and Notice.**—Error proceedings must be upon writ of error or petition to revise, and upon due notice.⁶⁴

§ 2945½. **If by Writ of Error.**—If it be by writ of error, a bill of exceptions is requisite. But if the error is patent on the face of the record a bill of exceptions is not necessary, as where there has been a jury trial of an involuntary bankruptcy petition where the only issue on review is whether on the face of the pleadings the claim of one of the petitioning creditors is a provable debt.⁶⁵

63. See cases cited ante, § 2881, et seq.; §§ 2928, 2941

64. Attesting of writ of error; its amendability; laches in asking for its dismissal. *Long v. Farmers' State Bk.*,

17 A. B. R. 103, 147 Fed. 360 (C. C. A. Iowa).

65. *Grant Shoe Co. v. Laird Co.*, 212 U. S. 445, 21 A. B. R. 484.

The citation upon a writ of error is defective where it does not give the names of all applicants for the writ.⁶⁶

Error will not lie to a refusal of a motion to quash an indictment on account of anything which may be raised by demurrer.⁶⁷

§ 2946. If by Petition to Revise, Filing of Petition and Notice, Sole Requirements.—In error proceedings by petition to revise, in the absence of local rule of court and a showing of prejudice to some party's rights, no other requirements exist than the filing of the petition to revise and the giving of notice; the petition for review need not be "allowed" by the judge; bond need not be given; the transcript of the record filed need not be certified, and need not contain the pleadings nor the evidence, nor show the parties, and need not be filed within any particular time.

Drug Co. v. Drug Co., 14 A. B. R. 477, 136 Fed. 396 (C. C. A. Tex.): "The trustee of the bankrupt's estate moves to dismiss this petition to revise because it was not allowed by any judge of this or the lower court; no bond has been given; the transcript of the record filed is not certified by the clerk of the lower court; the transcript does not contain the pleadings upon which the issues were tried, nor show who are the proper parties to this proceeding; the transcript does not contain the evidence upon which the findings of the referee were based; the petition to revise was filed more than three months after the entry of the judgment below; and, lastly, because no supersedeas has been granted.

"In our opinion, none of these grounds are well taken. The statute allows the petition to revise to be filed on due notice, but provides no other regulations. This court has made no rules as to any of the requisites or formalities referred to in the motion to dismiss."

§ 2947. Petition for Review to Be Filed.—A petition for review must be filed.⁶⁸

But, as noted in the preceding paragraph, such petition for review need not be "allowed" by the judge, unless a rule of court so prescribes, or some showing is made of prejudice to some party's rights.

§ 2947½. Even by Prevailing Party, if Cross Errors Claimed.—The prevailing party may not be heard to urge cross errors, even though suggested by the assignment of errors or by argument, but he may be heard only in support of the decree or order below, unless he also files a petition for review.⁶⁹

Board of Com'rs, Kan. v. Hurley, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.): "An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, cannot confer jurisdiction upon an appellate court to consider or review decisions adverse to him upon questions suggested by an

66. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

67. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

68. Bankr. Act, § 24 (b): "Such

power shall be exercised on due notice and petition by any party aggrieved."

Inferentially, *In re Taft*, 13 A. B. R. 417, 133 Fed. 511 (C. C. A. Ohio).

69. See post, § 2961½.

assignment, or by an argument of cross-errors, nor can he be heard upon such question. He may be heard only in support of the order, decree, or judgment below."

§ 2948. Petition to Set Forth Order Complained of.—The petition should set forth the specific order complained of as erroneous.⁷⁰

In *re Taft*, 13 A. B. R. 417, 133 Fed. 511 (C. C. A. Ohio): "It is therefore an elementary rule of procedure that the petition for a review shall set out the matters of law we are asked to review."

In *re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.): "The petition in such case should state specifically the question of law which was involved and was ruled upon by the court below."

In *re O'Connell*, 14 A. B. R. 238, 137 Fed. 838 (C. C. A. Mass.): "We held that on petitions of this class the records should present to us simply, clearly and unequivocally the issues of law to the like effect as bills of exception, proceedings without a jury, and proceedings in the Supreme Court on admiralty appeals as provided in the act of Feb. 16, 1875. We also said that in order that it may appear by the record that issues raised on appeal were presented below, findings of fact which involve distinct propositions of law, or something else as a substitute therefor, are necessary."

§ 2949. How Far to Set Forth Issue on Which Erroneous Order Made.—The petition for review, it is said, should set forth the facts or findings of facts upon which the erroneous order was made.⁷¹

But it is questioned whether the petition is the proper place for the statement of facts. The body of the decision in *In re Taft* does not seem to support the syllabus in this particular.

The rule rather is that the petition should state specifically the question of law involved and ruled upon by the court below.⁷²

In *re Baker*, 4 A. B. R. 778, 104 Fed. 287 (C. C. A. Mass.): "Although, under Equity Rule 26, the old prolixity is not required, yet, following the guidance of the recognized precedents for bills of review for alleged errors in law this petition should have presented, in some way, enough of the tenor of the record in the District Court to enable us to perceive the issue of law which it seeks to raise."

§ 2950. Record to Set Forth Order Complained of.—The record on review, must set forth the order or judgment complained of: the mere opinion of the lower court is not sufficient.⁷³

^{70.} In *re Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 126, 127, 130 (C. C. A. Mass.); In *re Shoe & Leather Reporter*, 12 A. B. R. 248, 129 Fed. 588 (C. C. A. Mass.); In *re D. Abraham*, 2 A. B. R. 266, 93 Fed. 767 (C. C. A. Ala., reversed, on other grounds, in 5 A. B. R. 623, sub nom. *Bryan v. Bernheimer*).

^{71.} In *re Taft*, 13 A. B. R. 417, 133 Fed. 511 (C. C. A. Ohio); *Steiner v. Marshall*, 15 A. B. R. 487, 140 Fed. 710 (C. C. A. Md.); In *re Witherbee*, 30 A. B. R. 314, 202 Fed. 896 (C. C. A. Me.).

Answer to petition.—In the Eighth Circuit, under the rules thereof, it has been held that the defendant may take issue upon the allegations of the petition; and that a failure to deny or controvert allegations of fact is equivalent to an admission of their truth. In *re Frank*, 25 A. B. R. 486, 182 Fed. 794 (C. C. A. N. D.).

^{72.} In *re Richards*, 3 A. B. R. 145, 96 Fed. 975 (C. C. A. Wis.), quoted ante, § 2948.

^{73.} In *re Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 226, 227, 230 (C.

In *re* Richards, 3 A. B. R. 146, 96 Fed. 935 (C. C. A. Ind.): "We might properly dismiss this petition without consideration of the merits, both upon the ground that no order appears to have been entered by the District Court determining the prayer of the petition, and upon the further ground that the practice adopted by the petitioners in seeking a review of the decision below is not conformable to law. * * * The petition in such case should state specifically the question of law which was involved and was ruled upon by the court below, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination."

§ 2951. And to Present, Clearly, Issues of Law.—The record on review should present clearly, and unequivocally, the issues of law presented.⁷⁴

§ 2952. Also, to Show Insufficiency of Grounds for Order.—The presumption is that the district court's order was founded on sufficient grounds and the contrary must be shown by the record.⁷⁵

And where the record does not contain the evidence taken before the court below or referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law, apparent upon the face of the record, may be considered.⁷⁶ And it may be presumed that defective descriptions were cured by the proof actually produced.⁷⁷

§ 2953. Whether Testimony and Other Evidence to Appear.—To what extent the testimony and other evidence must appear⁷⁸ is not fully settled.

C. A. Mass.), cited in *In re* O'Connell, 14 A. B. R. 237, 137 Fed. 838 (C. C. A. Mass.); *Rush v. Lake*, 10 A. B. R. 455, 122 Fed. 561 (C. C. A., reversing 7 A. B. R. 96); *In re* Pettingill & Co., 14 A. B. R. 757, 137 Fed. 840 (C. C. A. Mass.).

⁷⁴ *In re* O'Connell, 14 A. B. R. 237, 137 Fed. 838 (C. C. A. Mass.), quoted ante, § 2948; *In re* Boston Dry Goods Co., 11 A. B. R. 97, 125 Fed. 226, 227, 230 (C. C. A. Mass.). Analogously, *Devries v. Shanahan*, 10 A. B. R. 518, 122 Fed. 629 (C. C. A. Md.); impliedly, *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.); *In re* Roger Brown & Co., 28 A. B. R. 336, 196 Fed. 758 (C. C. A. Iowa); *In re* Throckmorton, 28 A. B. R. 487, 196 Fed. 656 (C. C. A. Ohio).

⁷⁵ *Williamson v. Richardson*, 30 A. B. R. 559, 205 Fed. 245 (C. C. A. Calif.); *Kuntz v. Young*, 12 A. B. R. 505, 131 Fed. 719 (C. C. A. Minn.); *In re* O'Connell, 14 A. B. R. 237, 137 Fed. 838 (C. C. A. Minn.). See ante, §§ 2841, 2890, 2922.

The record should show the order complained of is a final order deter-

mining the parties' rights or disposing of the suit.

⁷⁶ *In re* Baum, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.); *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa); *Williamson v. Richardson*, 30 A. B. R. 559, 205 Fed. 245 (C. C. A. Calif.).

[Controversy whether bonds were valid as liens, but record bare of provisions or terms of bonds themselves], *Synnott v. Tombstone Consol. Mines Co.*, 31 A. B. R. 124, 207 Fed. 544 (C. C. A. Ariz.).

⁷⁷ *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa).

⁷⁸ Analogously, (on appeal), *Williams Bros. v. Savage*, 9 A. B. R. 723, 120 Fed. 417 (C. C. A. Va.).

Compare, *Drug Co. v. Drug Co.*, 14 A. B. R. 477, 136 Fed. 369 (C. C. A. Tex.); "The trustee of the bankrupt's estate moves to dismiss this petition to revise because it was not allowed by any judge of this or the lower court; no bond has been given; the transcript of the record filed is not certified by the clerk of the lower court; the transcript does not contain the pleadings upon which the issues were tried, nor

However, where all the evidence is not shown, reversal on the weight of the evidence can not be had.

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.): "The record does not purport to give all the evidence, because the bill of exceptions concludes with a statement that what is recited in it was 'substantially all.' The case in the way shown to us is exceedingly thin, and, if we were judges of the fact as well as of the law, it may be that we should find against the United States in reference thereto. As, however, the proofs in cases of conspiracy are frequently purely inferential, we cannot say that there were not circumstances which appeared at the trial, but which are not shown, and which justified the District Court in sending the case to the jury. In the form in which the case comes to us, it is not so bare of possibilities that, sitting as a court of law, we can declare that there was error in overruling this motion."

§ 2954. **Not by "Bill of Exceptions."**—But a bill of exceptions has no function and accomplishes no purpose in proceedings in bankruptcy.⁷⁹ A proceeding in bankruptcy is a proceeding in equity.⁸⁰ Nevertheless, a so-called bill of exceptions may be treated as a stipulation of the parties as to the facts.⁸¹

But it has been held that the record should present simply, clearly and unequivocally the issues of law, to the like effect as bills of exceptions.⁸²

§ 2955. **Findings of Fact or Equivalent, Requisite.**—In order that it may appear by the record that issues raised in the reviewing court were presented below, findings of fact, which involve distinct propositions of law, or something else as a substitute therefor, are necessary.⁸³

In re Taft, 13 A. B. R. 419, 133 Fed. 511 (C. C. A. Ohio): "Having no authority to review a conclusion of fact, we must, if we can, discover the conclusions of fact upon which the district judge made the order complained of and review the questions of law necessarily raised and decided upon the facts so found. The district judge, however, made no separate finding of facts, but affirmed the 'findings' and 'decision' of the referee."

Landry v. San Antonio Brew. Ass'n, 20 A. B. R. 226, 159 Fed. 700 (C. C. A. Tex.): "We find in the transcript neither an agreed statement of facts, a find-

show who are the proper parties to this proceeding; the transcript does not contain the evidence upon which the findings of the referee were based; the petition to revise was filed more than three months after the entry of the judgment below; and, lastly, because no supersedeas has been granted. In our opinion, none of these grounds are well taken. The statute allows the petition to revise to be filed on due notice, but provides no other regulations."

Compare, ante, §§ 552, 1554, 2855.

^{79.} *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.).

^{80.} *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.).

^{81.} *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.).

^{82.} *In re O'Connell*, 14 A. B. R. 237, 137 Fed. 838 (C. C. A. Mass.), quoted ante, § 2948.

^{83.} *In re O'Connell*, 14 A. B. R. 238, 137 Fed. 838 (C. C. A. Mass.); *In re Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 226, 227, 230 (C. C. A. Mass.); *In re Shoe & Leather Reporter*, 12 A. B. R. 248, 129 Fed. 588 (C. C. A. Mass.); *In re Pettingill & Co.*, 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.); *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.); *Hegner v. American, etc., Bank*, 26 A. B. R. 571, 187 Fed. 599 (C. C. A. Ills.); *In re Throckmorton*, 28 A. B. R. 487, 196 Fed. 656 (C. C. A. Ohio).

ing of facts by the judge, nor even a summary of the evidence. Petitions to this court for superintendence and revision are restricted to questions of law. Therefore this petition is denied." On rehearing: "The record shows that the judge on the hearing considered the certificate of the referee as to the questions presented, and the summary of the evidence, and thereupon reversed the referee and entered judgment accordingly, so that we cannot from the record say whether the judge decided the case upon the facts reported by the referee or upon facts found by himself on the evidence. To determine whether the judge a quo correctly ruled the law, we must necessarily have before us the facts upon which he acted."

Ross v. Stroh, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.): "While neither the Bankruptcy Act nor the general orders in bankruptcy prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented. * * * There are no findings of fact by the District Court, and no specifications of legal error in the revisory petition, which enable us to do so. It does not appear even that they were argued before the District Court."

But findings of fact made by a special master and approved by the district judge are not brought up for review on a petition to revise.⁸⁴

§ 2956. Mere "Opinion" of District Court Insufficient, unless Made Part of Record.—The mere opinion of the district court is insufficient; ⁸⁵ unless it is specially made part of the record.⁸⁶

§ 2957. But May Be "Looked to."—But the "opinion" may be looked to, to ascertain in a general way the proposition on which the case has been disposed of, and in particular the questions of law passed on.⁸⁷

So, in the same manner the court may refer to findings of fact approved by the district judge.⁸⁸

And it may be thus "looked to" only when the proceedings are by way of petition for revision, not by way of writ of error.

§ 2958. Due Notice to Be Given.—The statute requires that the power to revise shall be exercised on due notice.⁸⁹ What is due notice, so far as time is concerned, is not specified.⁹⁰

The form of the "due notice" is undoubtedly the usual form in cases of revision in the federal courts.

84. *Matter of Caponigri*, 25 A. B. R. 509, 183 Fed. 307 (C. C. A. N. Y.).

85. *In re Pettingill & Co.*, 14 A. B. R. 760 137 Fed. 840 (C. C. A. Mass.).

86. *In re Pettingill & Co.*, 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.); *Chapman Tr. v. Bowen*, 207 U. S. 89, 18 A. B. R. 844.

87. *In re Pettingill & Co.*, 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.).

Annexing Judges' "Opinion."—In some circuits, the court of appeals has

prescribed that the opinion of the court below is also to be attached as part of the record. *In re Robertshaw Mfg. Co.*, 14 A. B. R. 342, 135 Fed. 220 (D. C. Pa.).

88. *Instance, Matter of Caponigri*, 25 A. B. R. 509, 183 Fed. 307 (C. C. A. N. Y.).

89. Bankr. Act, § 24 (b) " * * * Such power shall be exercised on due notice and petition by any party aggrieved."

90. See post, subdiv. "E."

§ 2958 $\frac{1}{4}$. Confined to Facts Shown in Record.—And the reviewing court is confined to the facts shown in the record.⁹¹

§ 2958 $\frac{1}{2}$. Deficiency of Facts Not Cured by Allegations of Petition for Review.—Deficiency of facts in the record is not to be cured by allegations made in the petition for review.

In re Roadarmour, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio): "The petitioner seeks to review the action of the District Court in disallowing his claim for legal services in successfully resisting the allowance of certain claims presented against the bankrupt's estate. The record discloses that petitioner was not employed by the trustee to make such opposition, but that he was employed in that behalf by certain of the creditors of the bankrupt. It is alleged in the petition for review that petitioner's employment by creditors was had after the trustee in bankruptcy had refused to resist the allowance of the claims in question. There is nothing in the record presented to us sustaining this allegation. No finding of facts was made either by the referee, whose order of disallowance was reviewed by the district judge, or by the judge. The record attached to the petition for review is limited to the order of the referee, the order of the District Court and the opinion of the district judge, which contains the statement that the claims defeated aggregated a considerable amount and that petitioner's services 'were valuable and resulted in the disallowance of such claims.' The district judge based his disallowance of petitioner's claim upon the entire absence of authority to allow it 'under circumstances such as are here presented.' Petitioner discusses the question in his brief as if the refusal of the trustee in bankruptcy to oppose the allowance of the claims in question, and petitioner's employment in consequence of such refusal were established by the record. But such is not the case. The allegation in the petition for review filed in this court is no evidence of such fact; nor is the allegation referred to put in issue. We are confined to the record attached to the petition or sent up in connection with the proceedings to review."

SUBDIVISION "B."

PROCEDURE ON APPEAL.

§ 2959. Procedure on Appeal Follows Equity Appeal Procedure.—The appeal proceedings follow the manner of appeals in equity cases.⁹²

Not only is this expressly provided in § 25 (a), in the clause "as in equity cases," but it is in conformity with General Order No. XXXVI which provides:

"1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the Supreme Court of the territory shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated except as otherwise

⁹¹. See citations in preceding paragraphs of this subdivision impliedly or expressly supporting this proposition; also, In re Roadarmour, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio), quoted post at § 2958 $\frac{1}{2}$. Compare, analogous propositions as to referee's records on review, ante, §§ 2856, 2858.

⁹². In re Baker, 4 A. B. R. 778, 104 Fed. 287 (C. C. A. Mass.).

In re Standard Tel. & Elec. Co. (Knapp v. Milw. Tr. Co.), 24 A. B. R. 761, 216 U. S. 545 (affirming Knapp v. Milw. Tr. Co., 20 A. B. R. 671, 162 Fed. 675), quoted on other points at §§ 2875 and 2969.

provided by the Act by the rules governing appeals in equity in the courts of the United States."

In re Robertshaw Co., 14 A. B. R. 342, 135 Fed. 220 (D. C. Penn.): "So that §§ 698 and 750 of Revised Statutes as to what the transcript shall contain on appeal 'in causes in equity' are in full force and apply in this case, the latter of which, in the absence of stipulation, provides for the transmission of the whole of the record in the strict sense of the word (Nashau, etc., Co. v. Boston, etc., Co., 61 Fed. 237) and the former, for sending up the proofs, entries and papers on file 'necessary to a hearing of the appeal.'"

§ 2960. Application for Leave, Allowance, Citation and Notice.

—The practice is to present to the court appealed from, or to the court appealed to, an application for leave to appeal; and for the court then to enter an order allowing the applicant to appeal; whereupon the prayer for appeal, its allowance and the citation and service thereon should be filed with the district court, within the time limit.⁹³ But the prayer for reversal and the citation may be waived.⁹⁴

§ 2961. Assignment of Errors to Be Filed.—Before the allowance of an appeal, or at the time of its allowance, an assignment of errors should be filed. It has been held that this assignment of errors is indispensable and cannot be waived and that if it is not filed the appeal will be dismissed.⁹⁵ It must set out the errors separately and particularly.

Acme Food Co. v. Meier, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.): "The 11th Rule of this court requires that each error intended to be assigned shall be separately and particularly set out, and when it is to the charge, the assignment shall set out the part referred to totidem verbis. We have already ruled that this assignment, so far as it covers the question last alluded to, is not well taken. We cannot sustain a single assignment as partly good and partly bad without violating our rules. But aside from this the court was substantially right in saying that the testimony of Meier upon this point

93. U. S. Rev. Stats., § 997. *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.); *Norcross v. Nave*, 4 A. B. R. 317, 101 Fed. 796 (C. C. A. Mo.).

Paying Costs of Appeal Out of Estate.—Not allowed simply because appellant poor. *Keck Mfg. Co. v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

Appealing in Forma Pauperis.—*Keck Mfg. Co. v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio): "It had been the practice in this court until recently to allow the appellant to prosecute an appeal in forma pauperis; but that practice was dropped upon the authority of a decision of the Supreme Court. The Supreme Court held that the provision in regard to allowing an appeal to be prosecuted in forma pauperis applies only to the court of first instance, and does not apply to the appellate court. With due respect to the

Supreme Court whose rule is the same as ours, we have changed the rule, so that now this court does not permit an appeal in forma pauperis. In re *Bradford's* Petition, 71 C. C. A. 334, 139 Fed. 518."

94. *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.).

95. Rule XI of Circuit Court of Appeals: "The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ or error or appeal shall be allowed until such assignment of errors shall have been filed."

U. S. Rev. Stats., § 997. *Flickinger v. Nat'l Bk.*, 16 A. B. R. 679, 145 Fed. 162 (C. C. A. Ohio); *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.).

was uncontradicted. When the court undertook to state the evidence it was the duty of counsel to call attention to evidence overlooked, if important, and give the court an opportunity of correcting the statement. This was not done. We see no sufficient reason for noticing this as 'a plain error not assigned,' which under strong circumstances the court at its option may do under Rule XI.'

And where the assignment of errors is in such general form as not to sufficiently indicate the particular errors complained of as required by Rule XI, the court will not take cognizance of them; but in special circumstances may allow an amendment, if prompt application therefor be made.⁹⁶

But it has also been held that such requirement is not jurisdictional but is merely a rule of court and cannot prevail against the absolute right of the defeated party to appeal, granted by the act of Congress; in other words, that it is to be observed as a rule of court but not as a jurisdictional requirement.

Bernard v. Lea, 31 A. B. R. 436, 210 Fed. 583 (C. C. A. N. Car.): "The rule requiring assignments of error to be filed is a very wise one—vindicated by the experience of all appellate courts—but its enforcement is sometimes 'pushed to the extreme'—resulting in a denial of justice. With the limitation placed upon it, in Rule XI, the court retains the power to prevent this result. It makes the rule its servant and not its master."

In some jurisdictions such assignments as are not argued, either orally or in a brief, will be considered abandoned.⁹⁷

§ 2961½. Even by Appellee if Appellee Also Claims Cross-Errors.

An appellee who does not himself also take an appeal cannot confer jurisdiction upon the appellate court to consider or review decisions adverse to him, upon questions suggested by an assignment, or by an argument of cross-errors, nor can he be heard upon such questions. He may be heard only in support of the order, decree or judgment below.⁹⁸

§ 2962. Complete Record to Be Made.—A complete record must be made up and it must contain within itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing.⁹⁹

⁹⁶ *Flickinger v. Nat'l Bk.*, 16 A. B. R. 679, 145 Fed. 162 (C. C. A. Ohio).

Allowance Conditioned on Giving Bond.—Allowance of appeal on condition that bond be given by petitioner does not become effective until the bond is given and accepted, and the filing of an assignment of errors before or at the time of the approval of the bond is a filing within the time prescribed by the rule. *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.).

Single Assignment Sufficient Where Error and Appeal Simultaneous Prosecuted.—Where appeal and error are

prosecuted simultaneously to review the same rulings and the alleged errors are the same in both, a single assignment of errors is all that is necessary in order to comply with rule 11. *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.).

⁹⁷ *Sturdevant Bank v. Schade*, 27 A. B. R. 673, 195 Fed. 188 (C. C. A. Mo.).

⁹⁸ *Board of Com'rs Kan. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.). See ante, § 2947½.

⁹⁹ *Williams Bros. v. Savage*, 9 A. B. R. 723, 120 Fed. 497 (C. C. A. Va.); *In re Robertshaw Mfg. Co.*, 14 A. B.

Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.): "An appeal makes the entire record available to the appellant, and imposes the duty upon him, and upon the clerk of the lower court, to place the material parts of it in the transcript sent to the appellate court."

Compare, *Nat'l Bk. v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.): "A proceeding in bankruptcy is a proceeding in equity, and on an appeal to this court, or to the Supreme Court, the decisive issue is not whether there was an error in the admission or exclusion of evidence, but whether or not all the competent and relevant evidence presented to the Appellate Court sustains the decree. The established practice in the Federal courts in equity is that examiners, masters, and the Circuit Courts must, under rule No. 67 in equity, take, record, and, in case of an appeal, return to the Appellate Court, all the evidence offered by either party, that which was held to be incompetent or immaterial as well as that which they deemed competent and relevant, to the end that, if the Appellate Court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the excluded evidence. If evidence is objected to and ruled out, it must nevertheless be written down and preserved in the record, subject to the objections, or the ruling cannot be considered in the Appellate Court. From the general rule that all evidence offered must be taken and preserved, the evidence of a privileged witness, evidence plainly privileged and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted. *Blease v. Garlington*, 92 U. S. 1, 7, 8, 23 L. Ed. 521; *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, 213, 214, 74 C. C. A. 341, 343, 344, and cases there cited. Referees, other officers taking testimony, and the District Court are governed by the same rule of practice in the taking of evidence and the hearing of controversies in bankruptcy, where the reason for the rule is much stronger than in ordinary suits in equity, because many of the orders and decrees in bankruptcy are reviewable first in the District Court and again in the Court of Appeals, and the delays would be intolerable if it were necessary for each court to remand for further testimony whenever it found that excluded evidence should have been received."

And where the evidence does not appear, defective allegations will be presumed to have been cured by the proof.

State Bank v. Haswell, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa): "It is unnecessary to decide whether this description was sufficient to identify the land. The rule is that every presumption must be indulged in favor of the correctness of a judgment rendered by a court of competent jurisdiction until the contrary appears. 'Omnia praesumuntur rite et solemniter esse acta' is the maxim to be applied. Let it be conceded, then, that the petition failed to sufficiently describe the land charged to have been unlawfully con-

R. 341, 135 Fed. 220 (D. C. Pa.); *Devries v. Shanahan*, 10 A. B. R. 518, 122 Fed. 629 (C. C. A. Md.); impliedly, *Flickinger v. Nat'l Bk.*, 16 A. B. R. 678, 145 Fed. 162 (C. C. A. Ohio); *In re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.); impliedly, *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.); inferentially, *In re Baker*, 4 A. B. R. 778, 104 Fed.

287 (C. C. A. Mass.); inferentially, *In re O'Connell (In re Dow)*, 14 A. B. R. 237, 137 Fed. 838 (C. C. A. Mass.), quoted ante, § 2948.

Exhibits, Models, Books, etc., Where Not Capable of Being Transcribed or Photographed.—See post, § 2968; also, see *Keck Mfg. Co. v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

veyed, by not specifying the county or State in which it was located. Nevertheless the proof may have supplied the defect. The fact that the bank failed to bring the proof here for our consideration justifies us in the belief that it did so, and we ought, in the interest of justice, to so presume. The common-law rule of pleading was that: 'Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict.' Andrews' Stephen's Pleading, § 109."

§ 2963. Need Certify Only So Much as Sufficient to Exhibit Errors.—While appeal makes available the entire record, it is only necessary that so much of it as will exhibit the manner in which the question arose, and its determination, be certified.¹

In re Robertshaw, 14 A. B. R. 341, 135 Fed. 220 (D. C. Pa.): "The petition of the Imperial Woolen Company upon which this rule was granted, sets forth such parts of the record as they regard sufficient for a full and complete understanding of the case in the appellate court, and we are of the opinion that their judgment is right in this respect."

§ 2964. But Discretion of Parties in Making Up Record Not to Be Interfered with.—But the discretion of the parties as to what is essential should not be interfered with by the court whose error is complained of.

In re Robertshaw, 14 A. B. R. 341, 135 Fed. 220 (D. C. Pa.): "* * * but we know of no law which authorizes the court, from which an appeal is taken, to designate what records in the court below shall be certified upon which the appellate court shall determine the appeal; in fact, the judge of the court from which the appeal is taken ought not in the least interfere in the discretion allowed by the general terms used in the acts of Congress and rules of court in designating the record to be certified in cases of appeal, as his judgment is to be reviewed, and his opinion of the importance and relevancy of matters contained in the record might, in the estimation of counsel for one side or the other, be as faulty as it is claimed his judgment is from which an appeal is taken, and if an order of the court from which the appeal is taken could have the effect of restricting the record in all cases where such a decree had been made, there would be the possibility of a feeling upon the one side or the other that they had not secured a fair hearing on a full record."

It has been held that an appeal from an order granting a discharge will be dismissed where it is impossible to tell from the record whether any of the steps to perfect the appeal were taken in proper time nor when they were taken.²

1. Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.). Impliedly, In re Richards, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.). Cunningham v. Bank, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.).

2. Williams Bros. v. Savage, 9 A. B. R. 720, 120 Fed. 497 (C. C. A. Va.).

§ 2965. **Parties May Stipulate as to What Necessary.**—The parties may stipulate as to what is necessary and thus dispense with the entire record.³

But this, doubtless, would be subject to the correction of the court appealed from, to supply omissions or corrections.

§ 2966. **Must Be Stipulated or Certified That Complete Record of All Necessary.**—It must appear, either by stipulation or by certificate of the district clerk, that it is a full and complete record, or that it contains all that is necessary to the determination of the matters involved.⁴

§ 2967. **Record Imports Verity, May Not Be Contradicted, Explained or Extended by Evidence Dehors.**—The record, on review or appeal, imports absolute verity, and may not be contradicted, explained or extended by evidence dehors the record.⁵

§ 2968. **Remedies for Incomplete Transcript on Appeal.**—If the certificate of the clerk of the district court does not show that the record is full and complete, the appeal should not be dismissed, but the record should be completed.

Cunningham v. Bank, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.): "Counsel insist that as the transcript does not purport to be a full record, nor a record composed of such part of the record as has been agreed upon by stipulation or directed by the court, and that it is not a 'legal record,' and that the appeal should be dismissed upon the authority of *Meyer et al. v. Mansur & Tebbetts Implement Company*, decided by the Circuit Court of Appeals for the Fifth Circuit, and reported in 29 C. C. A. 465, and 85 Fed. 874.

"In *Railroad Company v. Schutte*, 100 U. S. 644, we find authority for a less vigorous rule. The transcript in that case had been made up of such papers and evidence as the appellant deemed necessary for the hearing of the matter involved by the appeal. The clerk certified that it was a transcript of such parts of the record as were 'necessary on the hearing of the appeal prayed and allowed in said cause.' It was urged by the appellee that much that was important had been omitted, and the court was moved to dismiss the appeal because no properly certified transcript had been filed. This the court declined to do, but ordered, 'that the appellees file with the clerk of this court, and with the counsel for the appellant, on or before the first day of February next, a statement of the papers, documents and proofs used on the hearing below, and omitted in the transcript now on file, which they deem necessary for the proper presentation of the cause, and that unless the appellant shall, on or before the

3. Obiter, In re Robertshaw, 14 A. B. R. 341, 135 Fed. 220 (D. C. Pa.); impliedly, *Cunningham v. Bk.*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Va.).

4. *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.).

Certificate must be that of district clerk, not of referee or special master. *Coal Fields Co. v. Caldwell*, 17 A. B. R. 139, 147 Fed. 475 (C. C. A. W. Va.).

5. In re McCall, 16 A. B. R. 670, 145 Fed. 898 (C. C. A. Tenn.).

Supplementing Facts Shown on Record.—The facts shown on the record may be supplemented by other facts than those shown therein under certain circumstances, it is held in some cases. Ex parte Cuddy, 131 U. S. 280; Ex parte O'Neal, 11 A. B. R. 196, 125 Fed. 967 (C. C. A. Fla.). Compare, instance on review of referee's order, In re Stokes, 26 A. B. R. 255, 185 Fed. 994 (D. C. Ga.). Compare as to review of referees' order, ante, §§ 2856, 2858.

15th day of March, file in this court as part of the record copies of such papers, duly certified by the clerk of the Circuit Court, or his deputy, under the seal of the court, this appeal be dismissed. If in this way unnecessary papers are brought up, we will, on application, make such order in respect to costs as may under the circumstances be proper.'

"It is desirable that a transcript sent to this court upon appeal shall contain no immaterial matter, and the third paragraph of the fourteenth rule of this court prescribes that, 'No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court shall be filed.'

"It is manifest that neither the counsel for the appellant nor the clerk can conclusively determine what parts are 'necessary to the hearing in this court.' When, therefore, the certificate does not show the record is a full and complete record of the entire proceedings, it ought to appear by stipulation or otherwise that it does include all that is necessary to a determination of the matters involved by the appeal, and if the appellee is not content with the transcript as filed, he should seasonably move the court to require the appellant to complete the record by filing a transcript of such other papers and evidence as he deems necessary and points out."

Upon a disagreement as to what the record shall contain, the best practice requires the appellant to file a precept with the clerk, pointing out specifically what records in his judgment are necessary to be certified; and if the appellee deems these insufficient, he may suggest a diminution of the record and ask for a certiorari.⁶ If a party to the appeal is aggrieved by want of sufficient record, he may move the court to require a more complete record to be transmitted.⁷

In such motion, the mover should point out the papers or other necessary matters in evidence that have been omitted.⁸

In *re Robertshaw Mfg. Co.*, 14 A. B. R. 341, 135 Fed. 220 (D. C. Pa.): "The best practice is to require the appellant to file a precept with the clerk, pointing out specifically what records in his judgment are necessary to be certified on the appeal."

Where there is not an entire lack of an assignment of errors but the transcript on appeal is imperfect, in that it does not contain all the evidence on which the cause was decided, the transcript may not be stricken from the files, but the remedy is an application to the court for a certiorari, to send up the missing matter.⁹

But of course where the record presents no error whatever, it will be dismissed.¹⁰

6. In *re Robertshaw Mfg. Co.*, 14 A. B. R. 341, 135 Fed. 220 (D. C. Pa.).

7. *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.); *Flickinger v. Nat'l Bk.*, 16 A. B. R. 679, 145 Fed. 162 (C. C. A. Ohio.); *Keck Mfg. Co. v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio.).

Costs for completing record, ordered paid by appellees with reservation of

decision as to ultimate taxation. *Keck Mfg. Co. v. Lorsch*, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio.).

8. *Cunningham v. Bank*, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.).

9. *Flickinger v. Nat'l Bk.*, 16 A. B. R. 679, 145 Fed. 162 (C. C. A. Ohio.).

10. *Synnott v. Tombstone Co.*, 31 A. B. R. 124, 207 Fed. 544 (C. C. A. Ariz.).

The court below, may, by nunc pro tunc order, correct the record to conform to the facts, upon suggestions of diminution thereof.¹¹

Where there are exhibits in the record in the court below, such as can not be transcribed or brought up to the Circuit Court of Appeals by proper representation, as, for instance, models and the like, which have been made part of the evidence in the lower court, they may be ordered by the judge of the court below to be sent up as part of the return to the appeal,¹² the rule applying, in general, to such matters as cannot be transcribed so as to be exhibited to the appellate court as they were exhibited to the court below,¹³ but not applying to the sending up of original books and records which could be transcribed or of which photographic copies could be made.¹⁴

§ 2969. Whether Findings of Fact Requisite on Appeal.—

Whether findings of fact are requisite in all cases on appeal is not settled.¹⁵

That they are demandable as of right in "proceedings in bankruptcy" proper, at least on the three subjects of adjudication of bankruptcy, discharge and allowance and rejection of claims under § 25 (a), has been held; and, again, it has been held that they are not demandable.¹⁶

No special finding of facts is requisite, at any rate, upon appeal in "controversies arising in bankruptcy proceedings," and the requirements of the Supreme Court's General Order No. 36, applicable to appeals in the three cases of bankruptcy proceedings proper specified in § 25 (a), are not applicable to appeals in such "controversies;" as, for instance, not as to orders on intervening petitions claiming liens on property which the trustee is asking leave to sell.¹⁷

In re Standard Tel. & Elec. Co. (Knapp v. Milw. Tr. Co.), 24 A. B. R. 761, 216 U. S. 545 (affirming Knapp v. Milw. Tr. Co., 20 A. B. R. 674, 162 Fed. 675): "A motion has been filed to dismiss the appeal for want of findings of fact and conclusions of law in the Circuit Court of Appeals, as required by General Order in Bankruptcy XXXVI. Whether or not such a finding of facts was required depends upon the character of the present proceeding. General Order in Bankruptcy XXXVI, authorized under subdivision b of § 25 of the Bankruptcy Act, provides for appeals under the act to this court from the Circuit Court of Appeals within thirty days after the judgment or decree, and for the making and filing of a finding of facts and conclusions of law separately stated, and that the record upon such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and conclusions of law.

"Section 25b provides for appeals from any final decision of a Court of Appeals allowing or rejecting a claim under the act, under such rules and within such time as may be prescribed by the Supreme Court of the United States.

11. Hays v. Wagner, 18 A. B. R. 163, 150 Fed. 533 (C. C. A. Ohio).

12. Keck Mfg. Co. v. Lorsch, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

13. Keck Mfg. Co. v. Lorsch, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

14. Keck Mfg. Co. v. Lorsch, 24 A. B. R. 705, 179 Fed. 485 (C. C. A. Ohio).

15. In re Rauchenplatt, 9 A. B. R.

766, 1 P. R. 441 (D. C. Porto Rico).

16. In re Mevers, 5 A. B. R. 4, 105 Fed. 353 (D. C. N. Y.).

17. In re Martin, 29 A. B. R. 935, 201 Fed. 31 (C. C. A. Ky.); Houghton v. Burden, 228 U. S. 161, 30 A. B. R. 16; Baker Ice Mach. Co. v. Bailey, 31 A. B. R. 512, 209 Fed. 603 (Kans.).

Such appeals are allowed when the amount in controversy exceeds the sum of \$2,000, and the question involved might have been taken by appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the Bankruptcy Act throughout the United States.

"Under authority of subdivision b, § 25, General Order XXXVI was adopted, and in the cases enumerated a finding of facts and conclusions of law must be made in the Circuit Court of Appeals, and the appeal taken within thirty days after the entry of the judgment or decree.

"The case at bar is not of that class; it is an intervention in a bankruptcy proceeding, and, within the meaning of the act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the Court of Appeals Act. Bankruptcy Act, § 24a; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709; *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, and cases therein cited.

"As the appeal was in the manner provided for in the Court of Appeals Act no special finding of facts was required under General Order XXXVI, and the motion to dismiss the appeal must be overruled."

Quoted further at § 2875, and on matters of substantive law at § 1207¼ and § 1258.

§ 2970. Record to Show Assignment of Errors, Prayer for Reversal and Citation.—The record must show the assignment of errors, the prayer for reversal and citation to the adverse party.

Lockman v. Lang, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.): "When an appeal is prayed and allowed in open court the prayer for reversal and the citation may be waived but the assignment of errors is indispensable to the perfection of the appeal."

§ 2971. Prayer for Reversal and Citation Waivable, but Assignment of Errors Not.—But if the prayer for reversal and the citation are waived, it will be sufficient if the record shows such waiver.¹⁸ The assignment of errors, however, can not be waived.¹⁹

§ 2972. Also, Time of Perfecting of Appellate Proceedings.—The record also must show the time when the proceedings were perfected.²⁰

§ 2793. Citation May Be Granted after Expiration of Appeal Time.—A citation is not jurisdictional and may be granted after the time to appeal has expired.

Lockman v. Lang, 12 A. B. R. 497, 132 Fed. 1 (C. C. A. Colo.): "A citation is not jurisdictional. Where an appeal has been allowed by the taking of security within the statutory time, and the transcript of the record has been filed and the case has been docketed at the proper term of the appellate court, the

18. *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.).

19. *Lockman v. Lang*, 11 A. B. R. 597, 128 Fed. 279 (C. C. A. Colo.).

20. *Williams Bros. v. Savage*, 9 A. B.

R. 720, 120 Fed. 497 (C. C. A. Va.). See post, § 2983.

When are appeal proceedings perfected? See post, § 2978.

failure to issue a citation within the time prescribed for the appeal does not detract from the jurisdiction of the reviewing court, or furnish ground for a dismissal of the appeal, but the appellate court will grant an opportunity to issue and serve a citation."

§ 2974. Record Sufficient if Contains All on Which District Court Acted if Not All on Which Referee Acted.—It is the district court's order that is being reviewed or appealed from in the circuit court of appeals, not the referee's order; and so the record is complete if it contains all the evidence on which the district court acted, even if it does not contain all the evidence on which the referee acted.

Cunningham v. Bank, 4 A. B. R. 192, 103 Fed. 932 (C. C. A. Ky.): "The documents and proofs desired by the appellee constituted the original evidence upon which the referee made the findings and orders which were subsequently reviewed by the judge below, is not denied. But that review, so far as appears from the transcript on file, or the affidavit which is the foundation of the motion now under consideration, was not made upon the original documents or other proofs which were before the referee, but upon a certificate of the questions presented and a summary of the evidence which related to those questions as provided by the Twenty-seventh General Order in Bankruptcy. That order is as follows:

"'When a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.'

"This order is based upon the fifth paragraph of the 39th section of the Bankruptcy Act of 1898, which, among other duties of the referee, requires that they shall make up records, 'embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judge.'

"Following the practice prescribed by the Twenty-seventh General Order, the appellants and appellee filed their respective petitions, setting out the errors complained of, and praying that the referee would certify the questions presented, and a summary of the evidence relating thereto and the finding and order of the referee thereon.'

"This the referee did, and at the instance of the appellee he amended his certificate by certifying certain additional facts desired as part of the summary of evidence. This certificate and summary are found in the record as certified, and no exception appears to have been taken, either before the referee or court, to the sufficiency and completeness thereof.

"In the absence of some order of the court below we must presume that the hearing in the district court was upon the summary of the evidence, thus certified by the referee, and that the original evidence now sought to be made part of the transcript constituted no part of the record in the court below.

"The clear purpose of the provisions of the 39th section, set out above was to avoid, as far as possible, the sending of the original proofs to the judge and to substitute therefor, where the ends of justice would permit, a summary thereof.

"To effectuate this object is the purpose of the General Order already referred to. Undoubtedly it was entirely within the competency of the judge at

request of either party to have directed the filing of all or any part of the original documents or proofs which were on file with the referee. Nothing before us indicates that any effort was made, either before the referee or judge, to supplement the summary of evidence certified to the judge in accordance with the terms of the General Order, and in this condition of things we think the present application should be denied."

§ 2975. Record to Be Printed.—The record must be printed.²¹

SUBDIVISION "C."

SECURITY FOR APPEAL AND REVIEW.

§ 2976. Bond Not Requisite, on Petition for Review, Except.—

But, in the absence of local rule of court and of any showing that any parties' rights will suffer, no bond need be given by petitioner on review under § 24 (b).²²

§ 2977. But Requisite on Appeal.—The giving and approval of security is necessary in order to perfect an appeal (except when the trustee appeals).²³

Credit Company v. Ark. Central Ry. Co., 128 U. S. 261 (cited in *Williams Bros. v. Savage*, 9 A. B. R. 723, 120 Fed. 497 (C. C. A. Va.): "An appeal cannot be said to be taken, any more than a writ of error can be said to be brought, until it is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers with the petition and allowance of the appeal, if there be such a petition and allowance, and the appeal bond and citation."

§ 2978. And Approval of Security, Perfects and "Allows" Appeal.—And the approval of the security perfects the appeal; and is the "allowance" of the appeal.²⁴

§ 2979. Perfecting Appeal Transfers Jurisdiction and No Further Steps Possible.—The perfecting of the appeal effects, ipso facto, a transfer of jurisdiction to the appellate court. It suspends the case in the lower court, and no steps therein can be taken during the pendency of the appeal.²⁵

First Nat'l Bk. v. State Nat. Bk., 12 A. B. R. 440, 131 Fed. 422 (C. C. A. Mont.): "The overwhelming weight of authority of the State courts is that an

²¹ *Williams Bros. v. Savage*, 9 A. B. R. 720, 120 Fed. 497 (C. C. A. Va.).

²² *Drug Co. v. Drug Co.*, 14 A. B. R. 477, 136 Fed. 396 (C. C. A. Tex.).

²³ *Rev. Stat. U. S.*, § 1000. Compare, *In re Dresser*, 14 A. B. R. 41, 43 (Ref. N. Y.).

A bond on appeal from an order of involuntary adjudication is sufficient although it runs only to the original petitioning creditors, although other petitioning creditors had joined. *Flick-*

inger v. Nat'l Bk., 16 A. B. R. 678, 145 Fed. 162 (C. C. A. Ohio).

²⁴ *Credit Co. v. Ark. Central R'y Co.*, 128 U. S. 261; *Lockman v. Lang*, 12 A. B. R. 497, 132 Fed. 1 (C. C. A. Colo.), quoted post, § 2979; *Williams Bros. v. Savage*, 9 A. B. R. 732, 120 Fed. 497 (C. C. A. Va.).

²⁵ Impliedly, *Williams Bros. v. Savage*, 9 A. B. R. 723, 120 Fed. 497 (C. C. A. Va.).

appeal, properly perfected, absolutely removes the case from the trial court, and places it in the appellate tribunal. The case must, of necessity, either be in the appellate or lower court. It cannot very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction. After the cause leaves the lower court, it is deprived of taking any action upon any question involved in the appeal. Many of the authorities in the State courts upon this point are collected and cited in Elliott's App. Proc., § 541. The Federal authorities are substantially to the same effect."

Lockman v. Lang, 12 A. B. R. 497, 132 Fed. 1 (C. C. A. Colo.): "An appeal is a matter of right, and it is allowed and the jurisdiction of the case is transferred to the appellate court by the acceptance, by the proper court or judge, of security upon the appeal, within the time fixed by the statute."

But this rule should be taken with the qualification that a stay of proceedings below should have been granted.

§ 2979½. No Stay of Pending Proceedings without Supersedeas Bond.—Without a supersedeas bond the appeal will not suspend the execution of an order, nor stop pending proceedings. Thus, an appeal from an adjudication of bankruptcy will not suspend an order upon the bankrupt to file schedules, unless a supersedeas bond be given.²⁶

§ 2980. Trustee Need Not Give Bond.—The trustee need not give security on appeal or review.²⁷

SUBDIVISION "D."

TIME FOR APPEAL AND REVIEW TO THE CIRCUIT COURT OF APPEALS.

§ 2981. Time of Appeal in Bankruptcy Proceedings Proper.—Appeal to the circuit court of appeals in bankruptcy proceedings proper must be taken within ten days after the judgment appealed from has been rendered.²⁸

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.): "As no appeal was prayed or granted from the judgment of adjudication within ten days after its rendition, the time for appealing therefrom expired at the end of the said ten days, and could not be extended or revived by any subsequent proceeding in the case."

§ 2982. May Be Heard by Appellate Court in Term or Vacation.—And may be heard and determined by the appellate court in term or va-

26. In re Philip Brady, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.). Compare ante, § 2860.

27. Bankr. Act, § 25 (c); In re Dresser & Co., 14 A. B. R. 41 (Ref. N. Y.). In re Barrett, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.).

28. Bankr. Act, § 25 (a). Williams Bros. v. Savage, 9 A. B. R. 720, 120 Fed. 497 (C. C. A. Va.); In re Good, 3 A. B. R. 604, 94 Fed. 389 (C. C. A. Mo.); Norcross v. Nave, 4 A. B. R.

317, 101 Fed. 796 (C. C. A. Mo.); Postlethwaite v. Hicks, 21 A. B. R. 70, 165 Fed. 897 (C. C. A. W. Va.); Morgan v. Benedum, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.); In re Philip Brady, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.); Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.); obiter, In re Martin, 29 A. B. R. 935, 201 Fed. 31 (C. C. A. Ky.); Rode & Horn v. Phipps, 27 A. B. R. 827, 195 Fed. 414 (C. C. A. Tenn.).

cation as the case may be.²⁹

The provisions of § 25 (a) limiting the time for appeal to ten days, apply exclusively to appeals in the three cases mentioned in the statute allowing appeals in bankruptcy proceedings proper.³⁰

§ 2983. Record to Show Time of Appeal.—And the record must show the time of the appeal.³¹

§ 2984. Date of Entering Order or Judgment, Not of Actual Rendition, Fixes Date.—The date of the filing of the order with the clerk or the entry of judgment, and not the date of the actual rendition of the order or judgment, fixes the time for appeal and writ of error.³²

§ 2985. Appeal Not "Taken" until "Allowance" Made, and Bond and Citation Filed.—An appeal is not "taken," within the meaning of § 25 (a), until the petition and allowance of appeal are made, where there is such petition and allowance, and the appeal bond and citation are filed in the court which made the decree appealed from.³³

§ 2986. But Delay in Bond and Citation Not Fatal, if Appeal "Allowed" in Time.—If the appeal is allowed in time, but delay occurs in filing the bond and serving the citation to perfect the appeal, the appeal will not be dismissed.³⁴

Columbia Iron Wks. v. Nat'l Lead Co., 11 A. B. R. 340, 127 Fed. 99 (C. C. A. Mich.): "It appears that the appeal was prayed and allowed within ten days, as prescribed by the act, but that the bond was not filed, nor the citation issued and served, until a few days after the expiration of the ten days. But the general rule is that when an appeal is allowed within the time prescribed by law it is sufficient for the purpose of removing the case, though it is necessary, in order to perfect the appeal, that a bond should be filed and that a citation should be issued and served, where, as in this case, the appeal is not prayed in open court. The filing of the bond and the service of the citation are steps to be taken in perfecting the appeal, and if these steps are taken before a motion to dismiss the appeal is made, the court will ordinarily decline to dismiss the appeal because of the delay in filing the bond and serving the citation. In the present case the delay was for a few days only, and we do not think the interests of the opposite party were, to any appreciable extent, impaired thereby. The motion to dismiss upon that ground is, therefore, denied."

29. Bankr. Act, § 25 (a); *Williams Bros. v. Savage*, 9 A. B. R. 720, 120 Fed. 497 (C. C. A. Va.).

30. *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.); *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 988 (C. C. A. Iowa).

31. *Williams Bros. v. Savage*, 9 A. B. R. 720, 120 Fed. 497 (C. C. A. Va.). See ante, § 2972.

32. U. S. Rev. Stats., § 1008; *Peterson v. Nash Bros.*, 7 A. B. R. 181, 112 Fed. 311 (C. C. A. Minn.); *In re McCall*, 16 A. B. R. 670, 145 Fed. 898 (C.

A. Tenn.); impliedly, *Norcross v. Nave*, 4 A. B. R. 317, 101 Fed. 796 (C. C. A. Mo.).

33. *Norcross v. Nave*, 4 A. B. R. 317, 101 Fed. 796 (C. C. A. Mo.). But compare (citation and bond not jurisdictional), *In re Hill Co.*, 17 A. B. R. 519, 148 Fed. 832 (C. C. A. Ills.). Also compare, ante, § 2973.

34. *In re Hill Co.*, 17 A. B. R. 518, 148 Fed. 832 (C. C. A. Ills.); *In re Quality Shop*, 29 A. B. R. 854, 202 Fed. 196 (C. C. A. Ind.).

Indeed, it is doubtful whether citation and bond are jurisdictional.

In *re Hill Co.*, 17 A. B. R. 518, 148 Fed. 832 (C. C. A. Ills.): "The general rule is established, as stated by this court in *McNulta v. West Chicago Park Com'rs*, 99 Fed. 328, that no citation is required 'when an appeal is allowed in open court at the same term when the decree was rendered.' In appeals in bankruptcy, however, this rule may not be applicable, for the reason that there are no stated terms of the bankruptcy court, as such, but the jurisdiction is exercised by the district courts throughout the proceedings (§ 2). 'In vacation, in chambers and during their respective terms.' Thus each 'proceeding in bankruptcy, from its commencement to its close upon the final settlement, is but one suit.' *Wisswell v. Campbell*, 93 U. S. 347, 348.

"The contention is that an appeal in such cases, not allowed *instante*, is not 'taken,' within the meaning of § 25a, unless a citation issues and bond is filed within the ten days. Whether a citation is needful, by way of notice to the parties, in any appeal in bankruptcy, may not be clear under the authorities; and the cases cited for and against the present motions are not harmonious in reference to citation or bond, as requisites to confer jurisdiction of any appeal. In *Jacobs v. George*, 150 U. S. 415, 416; and *Mattingly v. N. W. Virginia Railroad*, 158 U. S. 53, however, the general doctrine is established for appeals in equity that 'neither signing nor service of the citation is jurisdictional, its only office being to give notice to the appellees,' and that failure or defects therein may be cured after the time limited for appeal. Like rule is applied to perfect the bond for appeal. *Edmondson v. Bloomshire*, 7 Wall. 306, 311; *Peugh v. Davis*, 110 U. S. 227, 228. Under these decisions, the Circuit Court of Appeals of the Sixth Circuit so ruled in reference to appeal in bankruptcy in *Columbia Iron Works v. National Lead Co.*, 11 Am. B. R. 340, 127 Fed. 99, 101; and as well the Circuit Court of Appeals of the Eighth Circuit in *Lockman v. Lang*, 12 Am. B. R. 497, 132 Fed. 1, 3, and *Gray v. Grand Forks Mercantile Co.*, 14 Am. B. R. 780, 138 Fed. 344, 346. We concur in the view that bankruptcy appeals are within the rule thus stated, so that citation and bond are not jurisdictional requisites, and the motion to dismiss is overruled."

But compare, *Nazima Trading Co. v. Martin*, 21 A. B. R. 159, 164 Fed. 838 (C. C. A. Alaska): "There is in the record further ground of dismissal that, although the appeal was allowed on August 9, 1907, citation was not issued and the assignment of errors was not filed until February 25, 1908, and that in the meantime the October term of this court was held and adjourned. In *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127, and in *Pender v. Brown et al.*, 120 Fed. 496, 56 C. C. A. 646, it was held that by the intervention of a term of the appellate court between the allowance of an appeal and the issuance of the citation, if citation is not waived, the appeal becomes inoperative."

§ 2987. Application for Extension Too Late after Expiration of Time.—Applications for extension of time for filing come too late when made after the expiration of the time.³⁵

Compare, *Nazima Trading Co. v. Martin*, 21 A. B. R. 159, 164 Fed. 838 (C. C. A. Alaska): "No order was obtained extending the time to file the transcript in this court. It was not filed until five months after the return day. Intervening the return day and the filing of the transcript was the May term of this

³⁵. In *re Alden Electric Co.*, 10 A. B. R. 370, 123 Fed. 415 (C. C. A.). In *re Scott*, 3 A. B. R. 326, 99 Fed. 404 (D. C. N. Car.). Compare, inferentially, to same effect,

court, at which the appeal should have been heard. No showing whatever has been made of accident, or mistake, and no excuse of any kind is offered for the delay. It is within the sound discretion of the court, it is true, to relieve parties who have not complied with the rules; but that discretion should not be exercised in a case where there has been long delay and there is utter absence of excuse or extenuation."

§ 2988. Time for Appeal Begins from Date of Entry of Order Overruling Motion for Rehearing.—Where a motion for a rehearing has been filed in time, the time for appeal begins to run from the date of entry of the order overruling the motion.³⁶

Thus, from an order confirming a composition, not until entry of the order overruling the motion for a rehearing;³⁷ likewise, from an order sustaining a demurrer and dismissing a petition for adjudication.³⁸

§ 2989. Motion for Rehearing Not Filed in Time, Insufficient.—But if the motion for rehearing is not filed in time, it will be ineffective to revive the lost right of appeal.³⁹

Morgan v. Benedum, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.): "The Bankruptcy Act * * * § 25, * * * in plain terms provides that from orders allowing or rejecting a debt or claim of \$500 or over, such appeal shall be taken within 10 days after the judgment appealed from has been rendered: * * * This appeal should have been taken within 10 days from the order of 26th of July, 1906, and the time cannot be extended by means of a petition for review or rehearing filed more than a month thereafter. To do so would be to evade the statute of limitations entirely. The fact that the appeal was taken within 10 days from the order finally denying the application for a rehearing entered on the 31st day of October, 1906, cannot be used to bridge over the period from July to October."

36. *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.); inferentially, but obiter, *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.). But compare, contra, where the motion is not filed in time, *Morgan v. Benedum*, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.), and *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

37. *In re McCall*, 16 A. B. R. 670, 145 Fed. 898 (C. C. A. Tenn.).

38. *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.).

39. *Conboy v. Nat'l Bk.*, 16 A. B. R. 775, 203 U. S. 141; *In re Philip Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.); *Rode & Horn v. Phipps*, 27 A. B. R. 827, 195 Fed. 414 (C. C. A. Tenn.); compare, analogously, *In re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.), where a nunc pro tunc order was held ineffective, under local rule.

No Appeal from Order Denying Rehearing on Belated Motion.—No appeal lies from an order refusing an application for a rehearing filed after time for appeal has expired, either under the Bankruptcy Act or under the rules of equity. *Morgan v. Benedum*, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.): "No appeal lies from an order rejecting a petition for rehearing under the bankrupt law. Sections 24 and 25 of the Bankruptcy Act prescribe in what cases appeals may be had, and these sections manifestly do not cover such a case as this. * * * Assuming that the appellant relies on the rules and practice in equity causes as controlling in the matter of taking this appeal, he is clearly without remedy, as it is well settled that, inasmuch as petitions for rehearing are addressed to the sound discretion of the court, no appeal lies from an order refusing the same."

And an extension of time for hearing such a belated motion is not an extension of time for appeal.⁴⁰

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.): "As neither the motion nor the petitions to set aside said judgment were made or presented to the court until after the expiration of said ten days, the case cannot, for that reason, if no other, be brought, even by analogy, within the rule laid down by this court in the case of *Mills v. Fisher & Co.*, 20 Am. B. R. 237, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, that where a petition to rehear is filed within ten days after the judgment the time for taking an appeal is thereby extended."

§ 2990. Reviving Lost Right of Appeal by Motion Pretended to Be for Reconsideration of Merits.—It has been held, in some cases, that rehearings will not be granted upon the pretence of reconsidering the merits, where the real purpose is to revive the petitioner's right of appeal, which had been lost by delay.⁴¹

Obiter, *West v. McLaughlin Co.*, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.): "One purpose which runs through the Act is to require the prompt and expeditious winding up of estates, and the provision just copied was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it, we cannot accept as accurate or sustainable the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the statute, and go beyond the bounds of a proper discretion; but we do not doubt that an order disallowing a claim, as well as other orders, is within the control of the court making it, and that the court may, in the exercise of a sound judicial discretion, set it aside, even after the expiration of 10 days."

In re Wright, 3 A. B. R. 184, 96 Fed. 820 (D. C. Mass.): "The court is satisfied with its original decision upon the merits of the case, and will not grant a rehearing in order to give those merits further consideration. To grant a rehearing upon the pretense of reconsidering the merits of the case, but really to revive the petitioner's right of appeal, would be the employment of an unworthy fiction. The record should show the true purpose for which the rehearing was sought and granted."

It has been held, in other cases, that the right to grant a rehearing existing, it may be granted for the purpose of reviving the right of appeal.

In re Worcester County, 4 A. B. R. 496, 102 Fed. 808 (C. C. A. Mass.): "It is apparent that the purpose was to revive the right of appeal. * * * During that term the court had, of course, entire control over the decree entered on July 21st, and might at any time vacate it and enter a new decree. It is of no consequence whether the petition was regarded by the District Court as a petition for a rehearing or for review, as the power of the court in this particular is regardless of forms, and may be exercised even in a summary manner."

⁴⁰. *In re Philip Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.).

⁴¹. *In re Girard Glazed Kid Co.*, 12 A. B. R. 295, 129 Fed. 841 (D. C. Penn.).

Obiter, In re Hudson Clothing Co., 15 A. B. R. 254, 140 Fed. 49 (D. C. Me.): "It is undoubtedly true also, that the court has a right to grant a rehearing for the purpose of allowing an appeal to be taken." But in this case the rehearing was refused because the aggrieved party had been warned to get a stenographer to preserve the testimony and had neglected to get one.

§ 2991. Alias Order of Adjudication Ineffective to Revive Lost Right of Appeal.—And the entry of an alias order of adjudication, subsequently to the approval of a master's report and entry of order of adjudication thereon, will not revive a lost right of appeals.⁴²

§ 2991½. Likewise Motion to Vacate Adjudication.—Likewise, a motion to vacate the adjudication made after the expiration of the time limited for appeal is ineffectual to extend the time limit.⁴³

In re Goldberg, 21 A. B. R. 828, 167 Fed. 808 (C. C. A. N. Y.): "He did not appeal, and the time limited by the statute for taking an appeal expired March 1907. A year later, March 23, 1908, he moved the District Court to vacate the order of adjudication; his application was denied. This is merely an attempt indirectly to extend the time within which to review the adjudication of bankruptcy. This cannot be done."

Nor may appeal be taken from an order overruling the motion to vacate the adjudication, even though taken within ten days from such order, because such an order is not appealable either as a proceeding in bankruptcy (not being mentioned in § 25 (a)) nor as a "controversy," but such order is reviewable by petition for review.

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.): "While, however, in so far as the appeal was taken from the order or judgment of June 9, 1908, the motion to dismiss cannot be sustained upon the ground upon which it was based, namely, that the appeal was not taken in time, the court is constrained of its own motion to dismiss such an appeal, for the reason that the order or judgment overruling the motion to set aside the judgment of adjudication is not one from which an appeal will lie to this court. As already stated, it is not one of the specified judgments which are reviewable by appeal under § 25a of the Bankruptcy Act. Neither will an appeal lie under § 24a of the Act, investing the Circuit Courts of Appeals with 'appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy of which they have appellate jurisdiction in other cases.' The 'controversies arising in bankruptcy proceedings' referred to in this section, as has been heretofore held by this court, are 'those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's estate, and claimants asserting some right or interest adverse to the bankrupt or his general creditors,' and do not include 'administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate,' which, under § 24b of the Bankrupt Act, are subject to revision by this court in matter of law upon petition for review. While

⁴². In re Berkebile, 16 A. B. R. 277, 144 Fed. 577 (C. C. A. N. Y.).

22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.), quoted in this same paragraph.

⁴³. *Brady v. Bernard & Kittinger*,

the line of demarcation between the classes of cases respectively appealable and reviewable is not always distinctly marked, it is clear that the proceedings under the motion to set aside the judgment adjudicating Brady a bankrupt related to an administrative matter which arose in the ordinary course of the administration of the bankrupt estate, under the power of the court to set aside a judgment improperly obtained as an incident to the principal cause and without recourse to an original proceeding for that purpose. (*Doss v. Tyack*, 14 How. 297, 14 L. Ed. 428.) And that the order or judgment overruling the motion to set aside the adjudication would have been reviewable by this court in matter of law upon a petition for review seasonably filed in this court."

§ 2992. Time for Appeal in "Controversies," Limited by Act Creating Circuit Court of Appeals.—The time for taking appeal to the circuit court of appeals in "controversies arising in bankruptcy proceedings," and in independent actions brought by the trustee to recover assets, etc., is governed by the provisions of the act creating circuit courts of appeal.⁴⁴

Boonville Nat'l v. Blakey, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.): "The motions to dismiss are without merit and must be overruled. They proceed upon the theory that from all decrees or orders affecting the bankrupt's estate an appeal must be taken within ten days, under § 25 of the Bankrupt Act. This is an erroneous view. That section, limiting the time for appeal to ten days, has application only to decrees or orders in the bankruptcy proceedings; and to the three particular cases mentioned in the section. In the case at bar the claims were by the estate against strangers to the estate, asserted in independent proceedings. The section has no reference to independent suits to assert title to money or property as assets of the bankrupt against strangers to the proceedings. Such independent suits with respect to appeals come under the provisions of the Act creating the Circuit Court of Appeals with respect to the period of limitation for an appeal."

In re Gold, 31 A. B. R. 18, 210 Fed. 410 (C. C. A. Ills.): "The matter here involved [reclamation of goods bought through fraudulent misrepresentation], is however not cognizable under § 25(a), but is clearly a controversy arising in a bankruptcy proceedings, and as such is governed by the provision of § 24(a) of the act, and the terms of the judiciary act of March 3, 1891. Consequently the amount involved is not limited and the appeal, having been taken within six months from the entry of the order, was properly perfected."

§ 2993. No Express Time for Petitions for Review.—Petitions for review to the circuit court of appeals have no express time limit for filing.⁴⁵

44. Inferentially, *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa); inferentially, *In re Robertshaw*, 14 A. B. R. 342, 135 Fed. 220 (D. C. Pa.); *In re Martin*, 29 A. B. R. 935, 201 Fed. 31 (C. C. A. Ky.); *U. S. Fidelity Co. v. Bray*, 28 A. B. R. 207, 225 U. S. 205.

45. *In re Holmes*, 15 A. B. R. 693, 142 Fed. 391 (C. C. A. Colo.); *In re N. Y. Economical Ptg. Co.*, 5 A. B. R.

106 Fed. 839 (C. C. A. N. Y.); *In re Worcester Co.*, 4 A. B. R. 496, 102 Fed. 808 (C. C. A. Mass.); *In re Strobel*, 20 A. B. R. 22, 160 Fed. 916 (C. C. A. Y.).

Court Rule Limiting to Ten Days.—The Circuit Court of Appeals of the second circuit has adopted Rule No. 38, limiting the time to ten days, *In re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.). Such time

Drug Co. v. Drug Co., 14 A. B. R. 477, 136 Fed. 396 (C. C. A. Tex.): "The statute allows the petition to revise to be filed on due notice, but provides no other regulations. This court has made no rules as to any of the requisites or formalities."

In re Groetzinger & Sons, 11 A. B. R. 467, 127 Fed. 124 (C. C. A.): "The ground upon which the motion to dismiss the petition for review rests is that the petition was not filed within six months after the entry of the decree. * * * But * * * neither the Bankrupt Act nor any rule of court limits the time within which a petition for a review in bankruptcy may be filed."

§ 2994. But Dismissed for Laches.—But will be dismissed for laches in prosecuting the proceedings.⁴⁶

§ 2995. But Not Dismissed unless Delay Unreasonable.—But will not be dismissed unless there has been unreasonable delay.⁴⁷

§ 2996. Delay Excusable on Good Cause Shown.—And delay in filing the record may be excused on good cause shown.⁴⁸

In re Groetzinger & Sons, 11 A. B. R. 467, 127 Fed. 124 (C. C. A.): "Yet, upon the facts appearing, we think a reasonable excuse is shown for delay in filing the petition for review."

But neglect of the referee to certify the facts will not excuse the petitioner in review.⁴⁹

§ 2997. By Analogy Should Be Filed within Six Months' Time.—By analogy, the petition for review should, in good practice, be filed within the six months' time fixed by chapter 517, § 11, 26 Stats. U. S. 829, for review in other cases.⁵⁰

may be extended on motion filed before the expiration thereof. *In re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.).

46. *In re Koenig & Van Hoogenhuyze*, 11 A. B. R. 617, 127 Fed. 891 (D. C. Tex.), in which case a delay of two years and nine months from the filing of the petition of review, without any real effort to prosecute it to a hearing and determination, was held to justify its dismissal upon the ground that it was not prosecuted with due diligence.

Compare, to same effect, *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.).

Instance, *Blanchard v. Ammons*, 25 A. B. R. 590, 183 Fed. 556 (C. C. A. Ariz.).

47. *In re N. Y. Economical Ptg. Co.*, 5 A. B. R. 697, 106 Fed. 839 (C. C. A. N. Y.); analogously, *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.). Compare, inferentially, *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

48. Compare, to same effect, *Drug Co. v. Drug Co.*, 14 A. B. R. 477, 136 Fed. 396 (C. C. A. Tex.).

49. *In re Koenig & Van Hoogenhuyze*, 11 A. B. R. 617, 127 Fed. 891 (D. C. Tex.).

50. *Blanchard v. Ammons*, 25 A. B. R. 590, 183 Fed. 556 (C. C. A. Ariz.). Obiter, *In re N. Y. Economical Ptg. Co.*, 5 A. B. R. 697, 106 Fed. 839 (C. C. A. N. Y.); obiter, *In re Worcester Co.*, 4 A. B. R. 496, 102 Fed. 808 (C. C. A. Mass.); obiter, inferentially, *Loan & Trust Co. v. Graham*, 14 A. B. R. 313, 317, 135 Fed. 717 (C. C. A. W. Va.).

Inferentially, *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa); *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); instance, *In re Tomlinson*, 18 A. B. R. 691, 154 Fed. 834 (C. C. A. Okla.); thus for review of an order overruling a motion to vacate adjudication (filed after ten days from the date of adjudication); *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

In re Holmes, 15 A. B. R. 693, 142 Fed. 391 (C. C. A. Colo.): "The acts of Congress prescribe no time within which bills of review must be presented in ordinary cases in chancery and yet the rule is well settled that such bills, to correct errors apparent upon the face of the record, may not be successfully maintained unless they are within the times limited for the review by appeal of the decrees they question."

In re Groetzinger & Sons, 11 A. B. R. 467, 127 Fed. 124 (C. C. A.): "We think that, by analogy, such petition ought to be filed within the period of six months allowed by the Act of March 3, 1891, Stats., § 829, for an appeal in other cases."

§ 2998. At Least in All Cases of "Controversies."—At least in all cases of "controversies arising in bankruptcy proceedings," as distinguished from bankruptcy proceedings proper.⁵¹

§ 2999. Time for Review in Bankruptcy Proceedings Proper, Whether Ten Days by Analogy.—And it has been held in some cases that in bankruptcy proceedings proper (as distinguished from "controversies arising," etc.) the time for review should, by analogy to § 25 (a), be limited to ten days;⁵² but in other cases this has been denied and the rule announced that six months time is allowed.⁵³

§ 2999½. Time for Review on Writ of Error.—The statutes [Rev. Stats., § 1008; Act of March 3, 1891, c. 517, §§ 4, 5, 26 Stats. 826, 827] fix the time within which writs of error may be brought.⁵⁴

§ 3000. Rehearing Where Order Based on Authority Since Overruled.—Rehearing will be granted at any time within the term or before the court has completely lost jurisdiction, where the order sought to be reheard was based on an authority that has since been overruled.⁵⁵

It will also be granted "after term," if status quo is not altered, for there are no "terms" in the bankruptcy court.⁵⁶

In re Keyes, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.): "Of the above construction of § 57n, now authoritatively settled as the true construction in such manner as to bind the courts of bankruptcy within this circuit, it seems to me that the petitioners ought to have the same benefit which they would

quoted, on other point, at § 2991½. But see In re Good, 3 A. B. R. 605, 94 Fed. 389 (C. C. A. Mo.). Limited to ten days by rule in second circuit, see In re A. O. Brown, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.).

51. In re Friend, 13 A. B. R. 598, 134 Fed. 778 (C. C. A. Ills.).

52. In re Friend, 13 A. B. R. 598, 134 Fed. 778 (C. C. A. Ills.); But compare, In re Good, 3 A. B. R. 605, 94 Fed. 389 (C. C. A. Mo.). Obiter, Blanchard v. Ammons, 25 A. B. R. 590, 183 Fed. 556 (C. C. A. Ariz.).

So, by rule, In re Stroebel, 20 A. B. R. 22, 160 Fed. 916 (C. C. A. N. Y.).

Costs on Appeal and Error.—See In re Henschel, 8 A. B. R. 201 (D. C. N. Y.); In re Jourdan, 7 A. B. R. 186 (C.

A. Mass.); In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.). For discussion of costs on appeal and error, see general subject of "Costs," § 2001, et seq.

53. In re Youngstrom, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); inferentially, compare, In re Good, 3 A. B. R. 605, 94 Fed. 389 (C. C. A. Mo.); compare, inferentially, Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

54. Grant Shoe Co. v. Laird Co., 212 U. S. 445, 21 A. B. R. 484.

55. Unitype Co. v. Long, 17 A. B. R. 627, 143 Fed. 315 (C. C. A. Ohio).

56. "No terms in bankruptcy," see §§ 431, 858.

have had if the decision in *Powell v. Leavitt* had been announced a few weeks earlier, or if my decision in this case had been delayed until a few weeks later. Notwithstanding the fact that the petitioners claimed no appeal, as they might have done, I see no reason why a rehearing may not be ordered for this purpose; it being conceded that no steps have been taken since November 8, 1906, which have changed the situations of the parties so far as the distribution of the assets is concerned. The same funds which were then in the hands of the trustee he holds now, and it is not too late to admit the petitioners, if their right is clear, to a share in their distribution. The term of the court within which its decision of that date was made came to an end before this petition for rehearing was filed; but I think I am justified in holding that, in bankruptcy proceedings, the court's power to reconsider and revise its orders and decrees does not expire with the term at which they are made."

SUBDIVISION "E."

HEARING IN APPELLATE AND REVIEWING COURT.

§ 3001. **Objections Not Raised Below, Not Heard Above.**—Objections (other than jurisdictional objections not waivable) that have not been raised in the court below, will not, as a general rule, be considered on appeal or error in the Circuit Court of Appeals.⁵⁷

Buckingham v. Estes, 12 A. B. R. 182, 128 Fed. 584 (C. C. A. Tenn.): "The trustee has entered a motion here to dismiss the petition of Mrs. Estes, the appellee, because she is a married woman, and cannot sue in her own name without the intervention of a trustee or next friend. Without regard to the merits of this motion such an objection cannot for the first time be taken upon appeal."

Thus, where the only question contested in an involuntary bankruptcy proceeding was whether or not the alleged bankrupt was a person engaged chiefly in farming or the tillage of the soil, and, after hearing the evidence, the court made its finding and conclusion, upon which an order of adjudication was entered, and the opposing creditors made no objection to the want of proof of the acts of bankruptcy alleged, made no requests to find

⁵⁷. In *re Gutterson*, 14 A. B. R. 495, 136 Fed. 698 (D. C. Mass.); In *re Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 226 (C. C. A. Mass.); *Vehon v. Ulman*, 17 A. B. R. 435, 147 Fed. 694 (C. C. A. Ills.); *Bond v. Milliken*, 17 A. B. R. 811, 109 N. W. 774, 134 Iowa 447; *Frank v. Volkammer*, 205 U. S. 521, 17 A. B. R. 806; instance, *Love v. Export Storage Co.*, 16 A. B. R. 171, 143 Fed. 1 (C. C. A. Tenn.); impliedly *Miller v. Acid & Fertilizer Co.*, 211 U. S. 496, 21 A. B. R. 416, quoted at § 1491. Contra, on review of district court's affirmance of referee's order, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.), quoted ante, at § 2861½.

Contra, on review of referee's order

by district court, In *re Wilde's Sons*, 16 A. B. R. 386, 144 Fed. 972 (C. C. A. N. Y.): "* * * we are clearly of the opinion that, when a district court is reviewing an order or report of a referee in bankruptcy, under the very broad provisions of act, July 1, 1898, ch. 541, § 2 (10), 30 Stat. 546 (U. S. Comp. St., 1901, p. 3421), it may properly consider any point presented by the record then before it, whether such point was or was not discussed before or by the referee."

In the Supreme Court questions not passed on by the trial court may yet be passed on if raised in the Circuit Court of Appeals. Compare post, § 3023½; also *Friend v. Talcott*, 228 U. S. 27, 30 A. B. R. 31, quoted at § 3023½.

in respect thereto and did not object to the findings that were made for deficiencies in that regard, their objection, taken for the first time on appeal from the order of adjudication, that other findings should have been made in relation to the acts of bankruptcy or that the findings made were, for want of evidence, fatal to the judgment, comes too late.

Armstrong v. Fernandez, 208 U. S. 324, 19 A. B. R. 746: "From that order of adjudication this appeal was prayed, but it nowhere appears that Armstrong and others objected to the want of proof of the acts of bankruptcy or asked any findings in respect thereto, or objected to the findings that were made for deficiencies in that regard. In other words, Armstrong and others permitted the findings to be made as they were, and now say that other findings should have been made in relation to proof of acts of bankruptcy, without having objected that they were not made, or that the findings as made were on that account fatal to the judgment. The presumption is that if such a suggestion had been made to the court, the alleged deficiencies, if really existing, could have been supplied and would have been supplied. But the record and the certificate of the judge leave no doubt that the petition as to acts of bankruptcy was sustained by the facts."

And the grounds of objection to the admissibility of evidence should appear on the record as having been stated.⁵⁸

§ 3002. Record to Show Same Issues Presented to Court Below.

—And the record, on review, should show that the issues of law presented above were presented to the court below.⁵⁹

In re Boston Dry Goods Co., 11 A. B. R. 97, 125 Fed. 226 (C. C. A. Mass.): "This observation applies particularly to this case, to the extent that we ought not to take jurisdiction over propositions of the character submitted to us, which the record does not clearly show were brought specifically to the attention of the District Court, as we have already explained."

Bank v. Walker, 20 A. B. R. 840, 163 Fed. 510 (C. C. A. Md.): "The function of a petition to revise is certainly not to raise new issues of fact in this court, but on the contrary, to point out errors of law existing on the face of the record presented to us from the court below."

Thus, the point that the specifications in opposition to discharge were indefinite, not raised in the court below, will not be considered the first time on appeal.⁶⁰ Likewise, objections to a private sale, and to a sale before appraisement, cannot be made for the first time on review of the referee's order.⁶¹ And an objection that some of the property belonging to the bankrupt estate and ordered to be sold has not been inventoried in the manner required by the Bankrupt Act, cannot be urged for the first time upon a revisory petition.⁶² Again, where, in an action by a married

⁵⁸. Compare ante, § 552½.

⁵⁹. *In re O'Connell*, 14 A. B. R. 237, 137 Fed. 838 (C. C. A. Mass.); *In re Shoe & Leather Reporter*, 12 A. B. R. 248, 129 Fed. 588 (C. C. A. Mass.); *Fidelity Trust Co. v. Robinson*, 27 A. B. R. 784, 192 Fed. 562 (C. C. A. Minn.).

⁶⁰. *Osborne v. Perkins*, 7 A. B. R. 250, 112 Fed. 127 (C. C. A. Mass.).

⁶¹. *In re Gutterson*, 14 A. B. R. 495, 136 Fed. 698 (D. C. Mass.).

⁶². *In re Shoe & Leather Reporter*, 12 A. B. R. 248, 129 Fed. 588 (C. C. A. Mass.).

woman against her husband and his trustee in bankruptcy to enforce a resulting trust in certain land which was about to be sold as part of the bankrupt estate, the plaintiff is successful, the defendant may not, on appeal, for the first time object that the plaintiff cannot sue in her own name without the intervention of a trustee or next friend, nor that no decree pro confesso against the husband was taken for want of an answer, he not being an indispensable party to the suit.⁶³ The objection that the trustee and not the creditors nor bankrupt was the proper party, comes too late on review.⁶⁴

And where the evidence does not appear in the record, defective pleading will be presumed to have been cured by the proof.⁶⁵

§ 3003. Even Jurisdictional Questions, unless Nonwaivable, Not Considered for First Time on Review.—And where the questions are even jurisdictional but are waivable they will not be considered for the first time, on appeal or error. Thus, in a suit in the federal court, brought by a bankruptcy officer to recover assets fraudulently transferred (before the amendment of 1903 conferred jurisdiction), where no objection was made by the defendant until the case had reached the reviewing court, the defendant was held to be too late to raise objection to the jurisdiction.⁶⁶

§ 3004. But Will Be, if Not Waivable, Though Not Considered Below, nor Assigned as Error.—But jurisdictional errors that are not waivable by the parties will be considered by the reviewing court, though not brought to the attention of the court below, nor assigned as error above. The court will take notice of such errors, of its own accord.

Taft v. Century Sav. Bk., 15 A. B. R. 596, 141 Fed. 369 (C. C. A. Iowa): "The fact that the parties failed to suggest want of jurisdiction to the court below, or to this court, is of no importance. It is the duty of this court, sua sponte, to take notice of want of jurisdiction if the same appears by the record. *Chapman v. Barney*, 129 U. S. 677, 681; *Mattingly v. N. W. Virginia Railroad*, 158 U. S. 53, 57; *Yocum v. Parker*, 130 Fed. 770, 66 C. C. A. 80, and cases cited.

"An inspection of the petition discloses that there is no allegation showing the amount of the bankrupt's indebtedness. * * *

"* * * We observe no difference in principle between the omission of an averment bringing the debtor without the exception as to wage-earners or persons engaged chiefly in farming or the tillage of the soil and the omission of an averment bringing the debtor within the class which owes debts to the amount of \$1,000 or over. These provisions are both, in our opinion, jurisdictional, and either of the omissions just mentioned shows that the debtor proceeded against is not within the class of persons subject to the provisions of the Bankruptcy Act, or subject to the jurisdiction of the court in bankruptcy. The petition in this case was therefore defective in not disclosing that the debtor

⁶³. *Buckingham v. Estes*, 12 A. B. R. 182, 128 Fed. 584 (C. C. A. Tenn.).

⁶⁴. *In re Koenig & Van Hoogenhuyze*, 11 A. B. R. 619, 127 Fed. 891 (D. C. Tex.).

⁶⁵. *State Bank v. Haswell*, 23 A. B.

R. 330, 174 Fed. 209 (C. C. A. Iowa), quoted at § 2962.

⁶⁶. *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.).

owed at least \$1,000, and for that reason it conferred no jurisdiction upon the court to subject Cohen, the debtor, to the provisions of the Act."

But where lack of jurisdiction does not affirmatively appear on the face of the record, but is dependent upon questions of fact which have been decided in favor of jurisdiction by the court below, the appellate court will not, instead of dismissing an appeal wrongly taken, notice the alleged lack of jurisdiction nor remand the case with instructions to dismiss the entire proceedings.⁶⁷

§ 3005. Plain Error Noticed, Though Not Raised by Parties Themselves.—And the reviewing court has its option to notice a plain error, although it is not assigned.⁶⁸

Boonville Nat'l Bk. v. Blakey, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.): "Rule 11 of this Court, which provides that errors not assigned according to the rule will be disregarded, reserves to the court the right at its option to notice a plain error not assigned. The rule is one of order and of convenience in aid of the court, and was not designed to prevent the correction of an obvious error, in any case when, in the judgment of the court, the importance of the question demands its consideration. The necessity for proper and orderly proceedings in bankruptcy matters, and the restriction of power to the purposes and within the limits of the Bankrupt Act, require at our hands the consideration of the question, even if the supposed error were not well assigned."

§ 3006. Issues Directly Raised by Pleadings Considered, Though First Made Point of on Appeal.—And issues raised by the pleadings, particularly if jurisdictional, will be considered on appeal, although there first made point of.⁶⁹

§ 3007. Findings of Facts, or Equivalent, Essential to Show Issues Same.—In order that it may appear by the record that issues raised on appeal or error were presented below, findings of fact which involve distinct propositions of law, or something else as a substitute therefor, are necessary.⁷⁰

Upon an appeal of a petition of a conditional vendor for reclamation from the trustee the law and the facts are open for reconsideration.⁷¹

67. *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

68. Instance held not within the option, *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.).

69. In re *West*, 5 A. B. R. 734 (C. C. A. N. Y.): In this case an averment of the existence of the requisite \$500 was made in the petition, to which there was a general denial made, but there was a stipulation of counsel entered into which failed to refer to the amount of the creditors' claims: held,

reversible error, for which the cause was remanded for further proof.

70. In re *O'Connell*, 14 A. B. R. 238, 137 Fed. 838 (C. C. A. Mass.); In re *Boston Dry Goods Co.*, 11 A. B. R. 97, 125 Fed. 226, 227, 230 (C. C. A. Mass.); In re *Shoe & Leather Reporter*, 12 A. B. R. 248, 129 Fed. 588 (C. C. A. Mass.); In re *Pettingill & Co.*, 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.).

71. *Houghton v. Burden*, 228 U. S. 161, 30 A. B. R. 16, quoted at § 3023.

§ 3008. "Opinion" of Court Insufficient, Though May Be "Looked to."—The mere opinion of the district court is insufficient;⁷² unless it is specially made part of the record.⁷³ But the opinion of the court below may be "looked to," to ascertain, in a general way, the proposition on which the case has been disposed of, and in particular the questions of law passed on.⁷⁴

And a right decree will not be reversed because a wrong reason is given therefor.⁷⁵

§ 3009. Judgment on Facts Not Disturbed Except for Manifest Error.—The judgment of the court below on the facts will not be disturbed unless clearly against the weight of the evidence or unless plain and manifest error exists.⁷⁶

Hussey v. Dry Goods Co., 17 A. B. R. 516 (C. C. A. Kas.): "This court, in a uniform series of decisions, has declared that, when the trial court has considered conflicting evidence and made its findings and decree thereon, it will be taken as presumptively correct, and will be followed unless an obvious error has occurred in the application of the law or a serious and important mistake has been made in consideration of the evidence."

Loan & Trust Co. v. Graham, 14 A. B. R. 313, 135 Fed. 717 (C. C. A. W. Va.): "* * * and that fact both the referee and the lower court having determined adversely to the trust company, this court, treating this as a petition for review, could not disturb, and, treating it as an appeal, should only do so where those tribunals appear plainly to have been wrong in the conclusions reached by them. Under the facts of this case it may be said that there was room for difference of opinion as to just what was the true transaction between the parties; but certainly no such doubt as would justify this court in departing from the well-established rule of accepting the decision of the lower courts, particularly where they both coincide as to what are the facts."

Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.): "We

72. *In re Pettingill & Co.*, 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.).

73. *In re Pettingill & Co.*, 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.). *Chapman Tr. v. Bowen*, 18 A. B. R. 844, 207 U. S. 89. Also see ante, § 2956.

74. *In re Pettingill & Co.*, 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.); *Samel v. Dodd*, 16 A. B. R. 165, 142 Fed. 68 (C. C. A. Ga.); by local rule *In re Robertshaw Mfg. Co.*, 14 A. B. R. 342, 135 Fed. 220 (D. C. Pa.). Also, § 2957.

75. *Naylon v. Christiansen*, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.).

76. Compare ante, § 2861. *Osborne v. Perkins*, 7 A. B. R. 250, 112 Fed. 127 (C. C. A. Mass.); *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.); *Buckingham v. Estes*, 12 A. B. R. 182, 128 Fed. 584 (C. C. A. Tenn.), quoted post, this same paragraph: *Barton Bros. v. Produce Co.*, 14 A. B.

R. 502, 136 Fed. 355 (C. C. A. Ark.); *Woods v. Little*, 13 A. B. R. 742, 134 Fed. 229 (C. C. A. Penn.); *In re Levy & Co.*, 15 A. B. R. 166, 142 Fed. 442 (C. C. A.); *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa); *Clay v. Waters*, 20 A. B. R. 561, 161 Fed. 815 (C. C. A. Mo.); (Special Master) *Fouche v. Shearer*, 22 A. B. R. 828, 172 Fed. 592 (D. C. Ga.); *Carey v. Donohue*, 31 A. B. R. 210, 209 Fed. 328 (C. C. A. Ohio); *In re Dorr*, 28 A. B. R. 505, 196 Fed. 292 (C. C. A. Cal.); *Fidelity Trust Co. v. Robinson*, 27 A. B. R. 784, 192 Fed. 562 (C. C. A. Minn.).

Appellate Courts Do Not Presume Error, but Error Must Affirmatively Appear.—It is elementary that appellate courts do not presume error, but grant relief only in cases where it is made affirmatively to appear that error has been committed. *Williamson v. Richardson*, 30 A. B. R. 559, 205 Fed. 245 (C. C. A. Calif.).

do not regard it as improper to point out that, inasmuch as the issues were tried without the intervention of a jury, the findings of the court as to the facts are entitled to great weight upon appeal."

In *re Cole*, 16 A. B. R. 303, 144 Fed. 392 (C. C. A. Me., affirming 14 A. B. R. 389): "The question whether the money was in the possession or control of Mrs. Cole is, under the circumstances of this case, what the law designates a question of fact, over which we could, of course, have no jurisdiction on this petition, which raises only questions of law, unless the findings of the District Court against her was so wholly unjustified on the proofs as would require us, on a writ of error, to set aside a verdict of a jury for want of any evidence whatever to sustain it, or for some other reason kindred thereto."

In *re Noyes Bros.*, 11 A. B. R. 507, 127 Fed. 506 (C. C. A. Mass.): "It is a familiar rule in equity that an appellate court will not interfere with findings of fact * * * unless the findings are clearly erroneous, or, as it is sometimes expressed, manifestly against the weight of the evidence."

Coder v. Arts, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa): "When the court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand."

And it is especially true that the reviewing courts will not disturb a findings of facts except for manifest error, where both the referee and district judge have coincided.⁷⁷

Buckingham v. Estes, 12 A. B. R. 182, 128 Fed. 584 (C. C. A. Tenn.): "The master and the court below concurred in the finding of facts, and when that is the case this court will not reverse or modify unless a very plain mistake is definitely pointed out."

Analogously, *Page v. Rogers*, 211 U. S. 575, 21 A. B. R. 496: "But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings unless error is clearly shown."

Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.): "The true rule, however, in such cases as this, is that the findings of the master, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, but are not conclusive. *Furrer v. Ferris*, 145 U. S. 132, 134, * * * *Girard Ins. Co. v. Cooper*, 162 U. S. 529, 538, * * * *Moffatt v. Blake*, 75 C. C. A. 265, 145 Fed. 40. We have no disposition to depart from this rule."

But where the special master and the district judge are not in accord, there will be less hesitancy in disturbing such findings.⁷⁸

⁷⁷. *Loan & Trust Co. v. Graham*, 14 A. B. R. 313, 135 Fed. 717 (C. C. A. W. Va.); *Stephens v. Merchants' Bank*, 18 A. B. R. 560, 154 Fed. 341 (C. C. A. Ills.); *Nat'l Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 853 (C. C. A. Mo.). Compare similar proposition post, § 3025¼; also compare, analogously, *Manson v. Williams*, 22 A. B.

R. 22, 213 U. S. 453; *Page v. Rogers*, 21 A. B. R. 496, 211 U. S. 575; In *re Sweeney*, 21 A. B. R. 866, 168 Fed. 612 (C. C. A. Tenn.); *Canner v. Tapper Co.*, 21 A. B. R. 872, 168 Fed. 519 (C. C. A. Mass.).

⁷⁸. *Mason v. Wolkowich*, 17 A. B. R. 719, 150 Fed. 699 (C. C. A. Mass.).

Coder v. McPherson, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "The finding of the court upon this question of fact is presumptively correct, and it should be sustained unless some obvious error of law or serious mistake of fact intervened in the consideration of the case. The fact that the referee who saw and heard the witnesses and who enjoyed the best opportunity to judge of the credibility of their testimony came to a different conclusion detracts much, however, from the strength of this presumption."

And where the matter depends wholly on the credibility of the witnesses the special master's findings may be preferred to those of the District Judge.

In re Wheeler, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.): "In cases of this kind, where there is nothing in the evidence pointing one way or the other, we think it our duty to accept the findings of the branch of the court before whom the witness personally appeared, and who on that account, had superior opportunity to determine her credibility. In this case that branch of the court is the referee, who under the Bankruptcy Act * * * is given power, in the first instance, to find the facts; and all things considered, we think it was error in the District Court not to accept that finding."

And where the district court considered other evidence than simply the master's report, the master's report will not conclude the circuit court of appeals.⁷⁹ Where there are no express findings stated in such a way as to make it clear they are distinct findings upon questions of fact, the reviewing court will not attach the usual weight accorded to the findings of courts of first instance.⁸⁰

Where the District Court makes two inconsistent findings, the Circuit Court of Appeals will be guided by the evidence.

Mattley v. Giesler, 29 A. B. R. 132, 202 Fed. 738 (C. C. A. Neb.): "Another contention of counsel for the trustee is that laying aside the first finding on the subject, the evidence clearly proves that the value of this property was at least \$2,500. This claim is met by the defendant with a denial and with the legal proposition that where the chancellor has determined a question of fact upon conflicting evidence the appellate court will not disturb his findings unless it clearly appears that he has fallen into some error of law or has been misled by some substantial mistake of fact. The proposition of law, however, is deprived of its persuasive force in this case by the fact that the chancellor made two findings of the value of this property on the same evidence, one of \$2,500 and another of \$1,040. This court has accordingly carefully examined the record upon this question of value. The property consists of many items. The evidence of its value comprises a confused and contradictory mass of testimony and inventories, and a review and discussion of it would furnish no guide for future decisions and would be useless. Suffice it to say that this evidence has persuaded this court that the value of the property taken by Wolfe was \$1,500.00.

⁷⁹. *Merchants Nat'l Bk. v. Cole*, 18 A. B. R. 44, 149 Fed. 708 (C. C. A. Ohio).

⁸⁰. *Burleigh v. Foreman*, 12 A. B. R. 91, 139 Fed. 13 (C. C. A. Mass.).

Duty of Producing Proof Where Facts Peculiarly in Party's Knowledge.

—"The burden of proof lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is presumed to be cognizant." *West v. McLaughlin Co.*, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.).

Let the decree below therefore be so modified that it shall adjudge that the trustee shall recover, in addition to the recovery therein granted, \$460.00 and interest on this sum at seven per cent. per annum from April 4, 1907, and let the decree so modified be affirmed. Let the appellant recover his costs in this court and let the case be remanded to the court below with instructions to modify its decree as herein directed."

And where the findings are clearly against the weight of the evidence the reviewing court will reverse the lower court.

West v. McLaughlin, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.): "We do not question the general proposition, so often announced by appellate tribunals, where a case turns upon an issue of fact, particularly where the testimony is contradictory, and where there may be advantages in seeing or knowing the witnesses and hearing them testify, that the appellate court will presume that the findings of fact by the lower court were correct, though this is always with the qualification that such findings do not appear to be clearly against the weight of the testimony. *Ohio Valley Bank v. Mack*, 20 Am. B. R. 40, 163 Fed. 155."

§ 3010. Trivialities Not Considered—Substantial Interest to Be Shown.—Equity will not concern itself with trivialities;⁸¹ nor, unless, on the whole case, the proponent satisfies the court that he has a substantial interest that is in danger.

In re Boston Dry Goods Co., 11 A. B. R. 102 (C. C. A. Mass.): "In this particular case we do not feel called on to exercise the liberality with reference to the practice on petitions of this character which we have sometimes exercised, for the reasons which we have already stated. If it involved substantial interests, we might make the "due allowance" which we have said we have ordinarily made, and endeavor to sift out from the record the issues of law, if it presents any. We might feel called on to do this even in cases which could be said to relate to the mere administration by the District Court of the bankruptcy statutes. But the case at bar is not merely administrative in its character; it relates to a subject matter as to which, as we have already said, there is no suggestion of any practical detriment that would come to the estate from the determination of the District Court to which the petition relates, even if, strictly speaking, that determination should have been otherwise than what it was. It would be detrimental to the authority of the District Court, injurious to its administration of the bankruptcy statutes and involve the numerous and useless delays which those statutes evidently have been framed to avoid, if, in administrative matters where no substantial interests are concerned, we became meddlesome beyond what the law requires of us."

And, unless the error be prejudicial it will be disregarded.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.): "An omission quite general, and not at all peculiar to this case, arises from the fact, to which we have referred, that parties seem to overlook that it is not sufficient to show that a certain ruling was technically erroneous, but that it must also be shown that it was prejudicial, or, at least, that there is a presumption that it was prejudicial within the liberal rules of the Supreme Court

⁸¹. *In re Shoe & Leather Reporter*, Mass., cited and followed in *In re*
12 A. B. R. 249, 129 Fed. 588 (C. C. A. O'Connell, 14 A. B. R. 237).

in this respect. With all the various matters brought to our attention, we do not recall that there was a single one as to which it was pointed out to us that the alleged error was prejudicial, or that there was any presumption that it was so."

Likewise, where only moot questions are involved, the petition for review will be dismissed.⁸²

§ 3011. Clerical Mistake Disregarded.—And clerical mistakes will be disregarded.⁸³

§ 3011½. Discretionary Matter.—Where there is no abuse of discretion, discretionary matters will not be reviewed.⁸⁴

Thus, as to the issuance or quashing of a writ of habeas corpus ad testificandum to bring a witness or bankrupt from imprisonment to testify.⁸⁵

'It is no abuse of discretion to permit a defective verification to an involuntary petition in bankruptcy to be amended.'⁸⁶

Thus, similarly, the reviewing court will not interfere with the exercise of discretion as to the particular referee to whom a certain partnership bankruptcy proceedings should be referred.⁸⁷

Discretion in administrative matters will not be interfered with, except for manifest abuse, where both referee and district judge are in accord.⁸⁸

Again, where a real estate broker was refused commissions for procuring for the trustee a purchaser of the assets, though thereby he had got double the amount that previously had been bidden, the reviewing court refused to interfere with the discretion of the lower court.

Gold v. South Side Trust Co., 24 A. B. R. 578, 179 Fed. 210 (C. C. A. Pa.): "The petition of Gold set forth that he was a licensed real estate broker; that the highest price bid for the bankrupt's property was \$17,000; that 'your petitioner succeeded in getting for the same the sum of \$34,000, after working at the same for over three months.' There was neither proof nor allegation of any contract to pay on the part of the trustee, or any application to the referee for allowance for prospective service. In the absence of such contract or allowance, was the court in error in sustaining the refusal of the referee to allow fees? Clearly not. No legal liability existed, and, while it may be that under the facts here disclosed the referee might have allowed compensation, such allowance would be an exercise of discretionary power, and not an enforcement of legal rights. Indeed, the counsel for the appellant conceded at the argument in this court that the allowance of this claim by the court and

⁸². In re Altieri, 19 A. B. R. 459 (C. C. A. N. Y.); instance, writ of error dismissed, In re Iron Clad Mfg. Co., 28 A. B. R. 628, 194 Fed. 906 (D. C. N. Y.).

⁸³. In re McCall, 16 A. B. R. 670, 145 Fed. 898 (C. C. A. Tenn.).

⁸⁴. *Mulford v. Fourth St. Nat'l B'k*, 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

⁸⁵. In re Thaw, 21 A. B. R. 561, 166 Fed. 71 (C. C. A. Pa.).

⁸⁶. *Armstrong v. Fernandez*, 208 U. S. 324, 19 A. B. R. 746.

⁸⁷. In re Alden, 30 A. B. R. 48, 205 Fed. 145 (C. C. A. Mass.).

⁸⁸. *Gold v. South Side Trust Co.*, 24 A. B. R. 578, 179 Fed. 210 (C. C. A. Pa.). Compare *Lindeke v. Converse*, 28 A. B. R. 596, 198 Fed. 618 (C. C. A. Minn.).

referee was discretionary. Such being the case, and although there may be merit in the appellant's contention, we are strongly averse, unless it clearly appears wrong was done, to reversing a ruling concurred in by both referee and district judge in an administrative matter. If abuses threaten to creep into bankrupt procedure, those charged with local administration are in better position to prevent such abuses than are appellate tribunals. It follows, therefore, that in such matters the court's action should not be reversed, unless unmistakably wrong.

"Now in this case the appellant had no one but himself to blame if he is not paid for services he rendered. In common with a large number of brokers in the city, he received from the trustee a circular letter calling attention to this property. In response thereto he met the trustee, was encouraged to sell, and a commission of 2 per cent. was talked about; but, as he testifies, the trustee did not hire him to sell, and expressly told him that he 'would have to present your petition to the referee, or the court, in case you wanted any commission in the matter.'"

SUBDIVISION "F."

PROCEEDINGS AFTER DECISION ON APPEAL AND REVIEW.

§ 3012. **Enforcing Mandate of Appellate Court.**—The circuit court of appeals may enforce its mandate by mandamus.⁸⁹

After a cause has been remanded by the appellate court, the district court may re-examine the evidence and make any proper finding therefrom which is necessary to enforce the mandate of the appellate tribunal. Thus, as to a finding of the value of property.

Mattley v. Giesler, 29 A. B. R. 132, 202 Fed. 738 (C. C. A. Neb.): "This court said in its opinion that the trustee was entitled to recover the value of the property taken by Wolfe and remanded the case for a decree in conformity with that view. Counsel for the trustee maintains that these facts imposed the duty on the court below to render a decree for \$2,500.00 and interest, and that it erred in considering the evidence again and making another finding of the value of the property. But upon a motion for a rehearing the court below on September 28, 1909, withdrew its opinion of July 15, 1909, in which it found the property to be worth \$2,500.00 and delivered another opinion to the effect that the defendant was entitled to a decree, and it was pursuant to the latter opinion that the decree of dismissal of the bill of May 24, 1909, was made. *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619. In this latter opinion no finding of the value of the property appeared. There was therefore no finding or judgment of the value of the property taken by Wolfe in effect when the decree of dismissal was rendered or when that decree was reversed, and it was not error for the court below after receipt of the mandate to consider the evidence in the case and find the value of the property. Indeed, it was necessary for it to do so in order that it might obey the mandate of this court."

The district court has no power to limit the effect of the judgment or

⁸⁹. *Ex parte Chicago Title & Trust Co.*, 16 A. B. R. 848, 146 Fed. 742 (C. C. A. Ills.), reversed sub nom. *First Nat'l Bk. of Chicago v. Chicago Title & Trust Co.*, 207 U. S. 61, 19 A. B. R. 542,

Compare, *First Nat'l Bk. of Chicago v. Chicago Title & Trust Co.*, 19 A. B. R. 542, 207 U. S. 61, reversing *Ex parte Chicago Title & Trust Co.*, 16 A. B. R. 848, 146 Fed. 742.

order of the Circuit Court of Appeals, but is bound to obey it, and carry it into effect without limitation.⁹⁰

§ 3012½. Proceedings on Reversal and Remand without Prejudice.—When an order of the district court has been reversed and the case remanded, without prejudice, for further proceedings, it is not proper for the district court to amend the order, but the case should either be remanded to the referee to take additional proof and rehear the case, or the court should rehear the case on the petition to review.

In *re Lesaius*, 25 A. B. R. 102, 181 Fed. 690 (C. C. A. Pa.): "When this case was before this court (*Lesaius v. Goodman* (C. C. A., 3rd Cir.), 21 Am B. R. 446, 165 Fed. 889, 91 C. C. A. 567), we reversed the order of the District Court and remanded the case without prejudice to such further proceedings as justice might demand. After the case had been remanded it was then before the District Court on the petition of the trustee to review the order of the referee. Either of two courses might then have been pursued: First, the trustee might have applied to the court to remand the case to the referee to take additional proofs and rehear the case; or, second, he might have applied to the court for a rehearing on the petition to review. He did neither of these things. He asked the court, by a petition, to amend the order which this court had reversed. But there was no order of the District Court to be amended. It had been annulled by the order of this court, and stood for nothing. The order now before us is the so-called amendatory order of the court made upon the petition of the trustee. We do not see how it can be affirmed. We regret the necessity of sending the case back a second time.

"The order will be reversed; but, in view of the grave charges of fraud against the bankrupt, the case will be remanded with leave to the trustee to apply to the District Court, either for an order remanding the case to the referee for further proofs and a rehearing before the referee, or for a rehearing by the court on the trustee's petition to review the referee's order. No costs will be allowed to either party in this court on this proceeding."

90. In *re Hudson River Electric Co.*, 25 A. B. R. 873, 184 Fed. 970 (D. C. N. Y.).

CHAPTER LVIII.

APPEALS AND PETITIONS FOR REVIEW TO SUPREME COURT.

DIVISION 1.

Synopsis of Chapter.

- § 3013. Allowance or Rejection of Claims Only "Bankruptcy Proceedings Proper" Appealable to Supreme Court.
- § 3014. But Only Permissible, Then, if Amount in Controversy Exceeds \$2,000, etc.
- § 3015. Or Some Supreme Court Justice Certifies Essential to Uniform Construction of Act.
- § 3015½. Decision Must be Final.
- § 3016. Appeals to Supreme Court in "Controversies" Where Would Have Jurisdiction in "Other Cases."
- § 3017. "Other Cases" Refers to Cases Covered by Act Creating Circuit Courts of Appeal.
- § 3018. But Only in "Controversies" and Not in Bankruptcy Proceedings Proper.
- § 3019. Jurisdictional Questions, in "Controversies," Appealable Directly from District Court to Supreme, Only Where Jurisdiction Would Exist if Not Concerning Bankruptcy.
- § 3020. To Be on Certificate.
- § 3021. "Question of Jurisdiction" Means Jurisdiction Over Subject Matter as Pledged, Not Over Particular Person as Dependent on Proof.
- § 3021½. Appeal Does Not Lie from Decisions on Petitions for Review.
- § 3022. Appeals to Supreme Court to Be Taken within Thirty Days.
- § 3023. Record for Transmission to Supreme Court.
- § 3023½. Proceedings in Supreme Court on Appeal.

DIVISION 2.

- § 3024. Review by Error or Petition in Supreme Court.
- § 3025. Both Bankruptcy Proceedings Proper and Also "Controversies" Reviewable in Supreme Court on Certiorari.
- § 3025 1/10. No Reversal on Facts Where Two Lower Courts Have Concurred.
- § 3025 2/10. Question of Construction of Bankruptcy Act by Bankruptcy Courts.
- § 3025 3/10. Question of Construction of Supreme Court's Own General Orders in Bankruptcy.
- § 3025 9/10. Question of Construction of Bankruptcy Act by State Court.

DIVISION 3.

- § 3026. Decision of Highest State Court on Trustee's Action to Recover Assets Transferred Contrary to Bankruptcy Act, Presents Federal Question, Reviewable by Supreme Court.
- § 3027. State Court's Decision as to Scope of Prior State Judgment, Presents No Federal Question.
- § 3028. Decision Below Based on Well Settled General Law.

DIVISION 1.

APPEALS TO SUPREME COURT FROM COURTS OF BANKRUPTCY.

§ 3013. Allowance or Rejection of Claims Only "Bankruptcy Proceedings Proper" Appealable to Supreme Court.—The only matters

in "bankruptcy proceedings proper," as distinguished from "controversies," appealable from the circuit court of appeals to the United States Supreme Court, are cases of the allowance or rejection of claims.¹

And the rights and remedies of parties appealing to the Supreme Court of the United States are laid down in § 24 (a) and in § 25 (b) and (d).²

Thus, an appeal to the supreme court does not lie from an order of affirmance in the circuit court of appeals of the action of the district court in refusing to grant a discharge.

James v. Stone & Co., 227 U. S. 410, 29 A. B. R. 476: "Subdivision b of § 24 gives the Circuit Courts of Appeal jurisdiction to superintend and revise in matters of law the proceedings of courts of bankruptcy within their jurisdiction. Section 25 concerns appeals in bankruptcy proceedings of which an application for discharge is one. By the terms of subdivision a of that section an appeal is given to the Circuit Court of Appeals, first, from a judgment adjudging or refusing to adjudge the defendant a bankrupt; second, from a judgment granting or denying a discharge; and third, from a judgment allowing or rejecting a claim of \$500 or over. Subdivision b of § 25 regulates appeals from the Circuit Court of Appeals to this court, and is confined to decisions of the Circuit Courts of Appeals allowing or rejecting a claim under the Act, first, where the amount in controversy exceeds the sum of \$2,000 and the question involved is one which might have been taken on appeal or error to this court from the highest court of a State; or, second, where a justice of this court shall certify that, in his opinion, the determination of the question involved in the allowance or rejection of the claim is essential to a uniform construction of the Act. Section 25 further provides that controversies may be certified to the Supreme Court from other courts of the United States, and that the Supreme Court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the laws of the United States."

A ruling made in a subordinate issue, as to whether petitioning creditors held provable claims, is not appealable.³

§ 3014. But Only Permissible, Then, if Amount in Controversy Exceeds \$2,000, etc.—But such appeal is allowable only in two cases, 1st, where the amount in controversy in the allowance or rejection of the claim exceeds the sum of two thousand dollars and the question involved is also one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States.⁴

Chapman v. Bowen, 207 U. S. 89, 18 A. B. R. 844: "We are not able to perceive that a writ of error from the highest court of a State to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question; nor the validity of a statute of, or an authority exercised under, any State, on the ground of repugnancy

1. Bankr. Act, § 25 (b); *Wynkoop, etc., Co. v. Gaines*, 227 U. S. 4, 29 A. B. R. 369.

2. *Hutchinson v. Otis*, 10 A. B. R. 275, 115 Fed. 937 (C. C. A. Mass. aff'd in 190 U. S. 552, 10 A. B. R. 135).

3. *J. W. Calnan Co. v. Doherty*, 224

U. S. 145, 27 A. B. R. 880.

4. Bankr. Act, § 25 (b) (1); *Hutchinson v. Otis*, 10 A. B. R. 275, 115 Fed. 937 (C. C. A. Mass., aff'd S. C., 190 U. S. 552, 10 A. B. R. 135); *Blake, trustee, v. Openhym & Sons*, 216 U. S. 322, 23 A. B. R. 616.

to the Constitution, treaties or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against. The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

Thus, the rejection of a set-off forming an integral part of a claim is so appealable.⁵

Likewise, the claim of a secured creditor, where the trustee contends the security was fraudulently transferred in violation of § 67e.

Coder v. Arts, 213 U. S. 223, 22 A. B. R. 1: "Is the case one which might have been taken to this court upon appeal or writ of error from the highest court of the state? We are of opinion that it is. In determining the validity of the lien asserted to secure the claim, a construction of the Bankruptcy Act is directly involved. A construction of the Act is insisted upon by the appellant which would defeat the lien. On the other hand, the construction contended for by the appellee would give the lien validity. In such a case, had the case been in the state court, it might have been brought here for review under § 709 of the Revised Statutes."

§ 3015. Or Some Supreme Court Justice Certifies Essential to Uniform Construction of Act.—Or 2nd, where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.⁶

§ 3015½. Decision Must Be Final.—The right of appeal to the Supreme Court from a decision of the Circuit Court of Appeals allowing or rejecting a claim is given by § 25 (b) only where the decision is final, whether there is a certificate of a justice of the Supreme Court under § 25 (b) (2) or not.⁷

§ 3016. Appeals to Supreme Court in "Controversies" Where Would Have Jurisdiction in "Other Cases."—Appeals in controversies arising in bankruptcy proceedings may be taken to the Supreme Court from other courts of bankruptcy, from which it would have jurisdiction in other cases.⁸

Obiter, *First Nat'l Bk. v. Klug*, 186 U. S. 204, 8 A. B. R. 14: "Apart from § 25, the Circuit Courts of Appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on certiorari, or in certain cases by appeal, under § 6 of the act of 1891. *Mueller v. Nugent*, 184

5. *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 13 A. B. R. 447.

6. *Bankr. Act*, § 25 (b) (2).

7. *J. W. Calnan Co. v. Doherty*, 224

U. S. 145, 27 A. B. R. 880; *Duryea Power Co. v. Sternburgh*, 218 U. S. 299, 25 A. B. R. 66.

8. *Bankr. Act*, § 24 (a).

U. S. 1, 7 Am. B. R. 224; *Huntington v. Saunders*, 163 U. S. 319; *Aztec Mining Co. v. Ripley*, 151 U. S. 79, 81."

§ 3017. "Other Cases" Refer to Cases Covered by Act Creating Circuit Courts of Appeal.—The "jurisdiction in other cases" mentioned in § 24 (a), refers to the judiciary act of March 3, 1891, creating circuit courts of appeals.⁹

Thus, judgments of the circuit court of appeals in actions brought by the trustee in the district court under favor of the Amendment of 1903 conferring jurisdiction on the district court to recover property fraudulently or preferentially transferred, or in actions removed there from the state court for diversity of citizenship or otherwise, are final and cannot be reviewed by the Supreme Court.¹⁰

§ 3018. But Only in "Controversies" and Not in Bankruptcy Proceedings Proper.—But the Supreme Court has appellate jurisdiction in such "other cases" in accordance with the act of 1891, only in "controversies," not in bankruptcy proceedings proper.¹¹

Thus, the question as to whether a debtor should or should not be adjudged bankrupt is pre-eminently a question in the regular course of the bankruptcy proceedings themselves, and is governed as to appeals and reviews solely by the provisions found in the Bankruptcy Act relative to appeals and reviews in bankruptcy proceedings, and no appeal is allowed to the Supreme Court by the statute in such cases.¹²

As noted, ante, § 3013, appeals to the Supreme Court in bankruptcy proceedings proper are allowable in only one case, namely, that of the allowance or rejection of a claim or demand if the claim or demand be in excess of \$2,000, and the question involved be also one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States, or some justice certifies its review is essential to uniformity of construction of the Bankruptcy Act.

Thus, also, the bankruptcy court being necessarily vested with jurisdiction to determine a bankrupt's claim to exemptions, a direct appeal to the Supreme Court from an erroneous decision (of the United States district court) against an asserted right of exemptions of the proceeds of insurance policies will not lie, the jurisdiction of the court not being in issue within the meaning of the act of March 3, 1891.¹³

So, a question relating to the establishment of a lien on real estate, being one which may arise independently of bankruptcy proceedings, is ap-

9. *First National Bk. v. Klug*, 186 U. S. 201, 8 A. B. R. 14.

10. *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 11 A. B. R. 563; analogously compare, *Boonville Nat'l Bank v. Blakey*, 6 A. B. R. 13 (C. C. A. Ind.).

11. *Tefft, Weller & Co. v. Munsuri*,

222 U. S. 114, 27 A. B. R. 338; *Munsuri v. Fricker*, 222 U. S. 121, 27 A. B. R. 344.

12. *First National Bk. v. Klug*, 186 U. S. 204, 8 A. B. R. 14.

13. *Lucius v. Cawthon-Coleman Co.*, 196 U. S. 149, 13 A. B. R. 696.

pealable under the act of March 3, 1891.¹⁴

§ 3019. Jurisdictional Questions, in "Controversies," Appealable Directly from District Court to Supreme, Only Where Jurisdiction Would Exist if Not Concerning Bankruptcy.—Questions of jurisdiction arising in "controversies" may be appealed directly from the district court to the Supreme Court in cases where it would have jurisdiction if they had not arisen out of bankruptcy proceedings.¹⁵

Bardes v. Hawarden Bank, 178 U. S. 524, 3 A. B. R. 680: "By the 5th section of the Judiciary Act of March 3, 1891 (26 Stat. at L. 826, ch. 517), it was provided that appeals or writs of error might be taken from the District Courts or from the Circuit Courts direct to this court, among other cases, in any case in which the jurisdiction of the court was in issue, but that in such cases the question of jurisdiction alone should be certified from the court below for decision; by the 6th section, that in cases made final in the Circuit Courts of Appeals, those courts might at any time certify to this court any questions or propositions of law concerning which they desire instruction for the proper decision of the cases, and this court might answer the questions, or might require the whole record and cause to be sent up for consideration; and also that in respect of cases so made final, it should be competent for this court to require by certiorari or otherwise any such case to be certified to this court for review and determination with the same power and authority as if it had been brought here by appeal or writ of error.

"It was early held under that act (*McLish v. Roff*, 141 U. S. 661), that appeals or writs of error in cases in which the jurisdiction of the court was in issue could only be taken directly to this court after final judgments; and subsequently, in *United States v. Rider*, 163 U. S. 132, that review by appeal, writ of error, or otherwise, must be as prescribed by that act, and that the use of certificate was limited by it to the certificate by the courts below, after final judgment, of questions made as to their own jurisdiction, and to the certificate by the Circuit Court of Appeals of questions of law in relation to which the advice of this court was sought as therein provided. We there held that the Act of March 3, 1891, covered the whole subject matter, and furnished the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate.

"The Bankruptcy Act has made no change in this regard, and as this case has not gone to judgment, the certificate must be dismissed."

It is only when the jurisdiction of the trial court as a federal court is in question that its decision is reviewable in the supreme court.

Fidelity Trust Co. v. Gaskell, 28 A. B. R. 4, 195 Fed. 865 (C. C. A. Mo.): "When the issue regarding the jurisdiction of the trial court is conditioned, not by its power as a court of the United States, but by its general authority as a judicial tribunal, or by the general principles of jurisprudence and the established rules of practice regarding the disposition of the claims of interveners

14. *Hobbs v. Head & Dowst Co.*, 27 A. B. R. 484, 191 Fed. 811 (C. C. A. N. H.).

15. *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, 28 A. B. R. 207. Impliedly, *Lucius v. Cawthon-Coleman Co.*, 196

U. S. 149, 13 A. B. R. 696. Compare, instance of direct petition for review from district court to Supreme Court, *Ex parte O'Neal*, 11 A. B. R. 196, — Fed.—, from a conviction of contempt of court.

and other parties to equity and ancillary proceedings, or by the principles and rules which govern the proceedings of courts of concurrent jurisdiction between themselves, its decision is reviewable in the Circuit Court of Appeals."

And whether or not a question is involved under the laws of the United States must be decided upon the grounds of jurisdiction asserted in the pleadings, and not because of questions which may arise, or which have arisen, in the subsequent progress of the case.¹⁶

§ 3020. To Be on Certificate.—But there must be a certificate, certifying the question of jurisdiction, and only the question of jurisdiction is to be so certified.¹⁷

§ 3021. "Question of Jurisdiction" Means Jurisdiction Over Subject Matter as Plead, Not Over Particular Person as Dependent on Proof.—The "question of jurisdiction" refers to jurisdiction over the subject matter, as exhibited by the pleadings, not jurisdiction over the particular person as the same may be found by the evidence to exist or not to exist.¹⁸

First Nat'l Bk. v. Klug, 186 U. S. 204, 8 A. B. R. 14: "The conclusion was, it is true, that Klug could not be adjudged a bankrupt (being a 'farmer' and engaged chiefly in farming), but the court had jurisdiction to so determine, and its jurisdiction over the subject matter was not and could not be questioned."

Columbia Iron Wks. v. Nat'l Lead Co., 11 A. B. R. 341, 127 Fed. 99 (C. C. A. Mich.): "In this court a motion was made by the appellees to dismiss the appeal upon the ground that this court did not have jurisdiction thereof, but that the appeal should have been taken to the Supreme Court of the United States, for the reason that the question of the jurisdiction of the District Court was involved in that its order adjudged that the Columbia Iron Works was a corporation engaged principally in manufacturing or mercantile pursuits within the true intent and meaning of the Bankrupt Act, and upon the further ground that the appeal was not taken within ten days from the adjudication in bankruptcy. This court postponed the hearing of said motion to the hearing upon the merits. We think the motion to dismiss the appeal for want of jurisdiction thereof should be disallowed upon the authority of the case of *Denver First National Bank v. Klug*, 186 U. S. 202, 8 Am. B. R. 12. There can be no question in respect of the jurisdiction of the District Court over the subject matter, and it seems quite clear that it also had jurisdiction to determine whether the corporation was principally engaged in such business as that it could be adjudged a bankrupt."

§ 3021½. Appeal Does Not Lie from Decisions on Petitions for Review.—Appeal does not lie to the Supreme Court from a decision rendered upon a petition for review.¹⁹

Duryea Power Co. v. Sternbergh, 218 U. S. 299, 25 A. B. R. 66: "No appeal

16. *Lovell v. Newman & Son*, 227 U. S. 412, 29 A. B. R. 482.

17. *First National Bk. v. Klug*, 186 U. S. 204, 8 A. B. R. 14; *Bardes v. Hawarden Bank*, 178 U. S. 524, 3 A.

B. R. 680; *Chapman v. Bowen*, 207 U. S. 89, 18 A. B. R. 844.

18. *Fidelity Trust Co. v. Gaskell*, 28 A. B. R. 4, 195 Fed. 865 (C. C. A. Mo.).

19. *Holden v. Stratton*, 191 U. S. 115, 10 A. B. R. 786.

to this court lies from a decision in the exercise of supervisory jurisdiction. *Holden v. Stratton*, 191 U. S. 115, 10 A. B. R. 786. But it is said that the Circuit Court of Appeals treated this case as an appeal, that it did not follow the findings of the referee and the court below as it was bound to do on a revisory proceedings, that it filed a statement of the facts found and of its conclusions of law as required in an appeal by General Order 36 (3), etc."

§ 3022. Appeals to Supreme Court to Be Taken within Thirty Days.—Appeals from the circuit court of appeals, and from the supreme courts of the territories, and from the District of Columbia, and from other courts of bankruptcy, to the Supreme Court of the United States, are to be taken within thirty days after the judgment or decree appealed from.²⁰

If a motion for rehearing is filed within the thirty days though not decided until subsequent thereto, the time for appeal, nevertheless, will begin to run on the date of the original order, and not on that of the overruling of the motion for rehearing.²¹ And where the motion for a rehearing is not filed until after the expiration of the thirty days, it is ineffective to extend the time for appeal.²² Nor can the allowance of an appeal on the certificate of a justice of the Supreme Court, made after the expiration of the thirty days, operate as an adjudication that the appeal is in time.²³

Where an appeal is taken within the thirty days, and the Circuit Court of Appeals has made the findings of fact and conclusions of law part of the record by an order made within the thirty days directing the same to be filed nunc pro tunc, as of the date of the judgment, there is a sufficient compliance with General Order 36.²⁴

But the thirty days rule is not applicable to proceedings on writ of error, as, for example, where a jury trial has been had on an involuntary bankruptcy petition.²⁵ But this thirty day limitation relates only to appeals taken expressly under the bankruptcy act: it has no application where the appeal is taken from the circuit court of appeals under the act of March 3, 1891.²⁶

§ 3023. Record for Transmission to Supreme Court.—The record transmitted to the Supreme Court of the United States consists of the pleadings, the judgment or decree, the findings of facts and the conclusions of law; and it is made the duty of the court from which appeal is taken to make and file its findings of facts and its conclusions of law thereon and to state the same separately, at or before the time it enters the judgment or decree.²⁷

20. Gen. Ord. No. XXXVI 2. *Conboy v. Nat'l Bk.*, 203 U. S. 141, 16 A. B. R. 773.

21. Inferentially, *Conboy v. Nat'l Bk.*, 203 U. S. 141, 16 A. B. R. 773.

22. *Conboy v. Nat'l Bk.*, 203 U. S. 141, 16 A. B. R. 773.

23. *Conboy v. Nat'l Bk.*, 203 U. S. 141, 16 A. B. R. 773.

24. *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1.

25. *Grant Shoe Co. v. Laird Co.*, 212 U. S. 445, 21 A. B. R. 484.

26. *Hobbs v. Head & Dowst Co.*, 27 A. B. R. 484, 191 Fed. 811 (C. C. A. N. H.).

27. Gen. Ord. No. XXXVI 3. In re *Rauchenplat*, 9 A. B. R. 763, 1 P. R.

But such making and filing of its findings are not exacted of the court unless the parties indicate their intention to appeal.²⁸

Knapp v. Milw. Tr. Co., 20 A. B. R. 671, 162 Fed. 679 (C. C. A. Wis.): "The decree of this court was rendered on April 14, 1908. Whether the subject matter of this controversy makes a case that is appealable to the Supreme Court under subdivision 'b' of § 25 of the Bankruptcy Act * * * and whether it is too late in any event to take the appeal under § 2 of the General Order above quoted, are questions that would have to be considered should an allowance of an appeal hereafter be asked. At this time it is enough to say that we do not understand that § 3 of General Order 36 intends that a Circuit Court of Appeals shall, of its own motion, ascertain and determine in advance of its decision upon an appeal in bankruptcy, whether a question is raised upon which a party is entitled to allowance of an appeal to the Supreme Court. If such right is claimed, it should be called to attention, as we believe, in advance of decision, with request for findings in the event of adverse ruling upon the question alleged to be appealable. Whether findings of fact and conclusions of law are to be made and filed in this case, nunc pro tunc as of the date of such decree, can be determined if and when application for appeal to the Supreme Court is made and allowed." [Affirmed sub nom. *In re Standard Tel. & El. Co.*, 216 U. S. 545, 24 A. B. R. 761.]

Lumpkin v. Foley, 29 A. B. R. 673, 204 Fed. 372 (C. C. A. Ga.): "There has been no intimation of any purpose by counsel on either side to avail themselves of the right to appeal from the decision of this court, which would render necessary separate findings of fact and conclusions of law thereon, as contemplated in General Order No. 36. In the absence of such suggestion, which appears should have been made at the argument (*Knapp v. Milwaukee Trust Company* [C. C. A., 7th Cir.], 20 Am. B. R. 671, 162 Fed. 675, 89 C. C. A. 467), we proceed to consider and determine the questions raised by assignments on the record."

And the circuit court of appeals will not anticipate a further appeal but will await a request for findings and conclusions, and if the decree has been then entered, will vacate it, so that general order No. 36 may be observed.²⁹

Where the record fails to contain the findings of fact and conclusions of law, the appeal will be dismissed, and the omission cannot be supplied by reference to the opinion of the court below.³⁰

But the general order No. 36 does not apply to appeals under § 24 (a), where an adverse claimant has intervened for reclamation of property from the possession of the bankruptcy court.³¹

471 (D. C. Porto Rico); *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.); *J. W. Calnan Co. v. Doherty*, 218 U. S. 299, 27 A. B. R. 880.

²⁸. *Chapman v. Bowen*, 207 U. S. 89, 18 A. B. R. 844; *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.); *Lumpkin v. Foley*, 29 A. B. R. 673, 204 Fed. 372 (C. C. A. Ga.); *Washington v. Tearney*, 28 A. B. R.

633, 194 Fed. 830 (C. C. A. W. Va.).

²⁹. *Century Savings Bank v. Moody & Sons*, 31 A. B. R. 586, 209 Fed. 775 (C. C. A. Iowa).

³⁰. *Chapman v. Bowen*, 207 U. S. 89, 18 A. B. R. 844.

³¹. *In re Standard El. Tel. & El. Co.* [*Knapp v. Milw. Trust Co.*], 216 U. S. 545, 24 A. B. R. 761; *Baker Ice Machine Co. v. Bailey*, 31 A. B. R. 513, 209 Fed. 603 (C. C. A. Kan.).

Houghton v. Burden, 228 U. S. 161, 30 A. B. R. 16: "Burden voluntarily came into the bankruptcy proceedings and submitted his claim to the adjudication of the bankruptcy court. Such an intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an intervention in equity, and a decree is reviewable by appeal to the Circuit Court of Appeals in the exercise of its general appellate powers in equity cases under § 24a of the Bankruptcy Act. * * * Being an appeal from a decree in a controversy arising in a bankruptcy proceedings, and therefore, an appeal under § 24a, and not under § 25b, general order 36, made under the latter section, and requiring a finding of facts, has no application, and the appeal opens up the whole case as in other equity cases."

§ 3023½. Proceedings in Supreme Court on Appeal.—Questions passed upon by the Circuit Court of Appeals though not raised nor passed upon by the District Court may be considered by the Supreme Court.

Friend v. Talcott, 228 U. S. 27, 30 A. B. R. 31: "There is a contention that the questions of waiver and election, although passed on by the court below, are not open for our consideration because it is asserted they were not raised in or considered by the trial court. As we think the contention is without merit, we proceed to dispose of the propositions concerning election and waiver and *res judicata*."

An appeal from a decree in a controversy arising in a bankruptcy proceedings, in other words an appeal under § 24a and not under § 25b opens up the whole case as in other equity cases.³²

DIVISION 2.

REVIEW AND ERROR PROCEEDINGS IN SUPREME COURT FROM COURTS OF BANKRUPTCY.

§ 3024. Review by Error or Petition in Supreme Court.—Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereon and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.³³

§ 3025. Both Bankruptcy Proceedings Proper and Also "Controversies" Reviewable in Supreme Court on Certiorari.—The judgments and orders of the circuit court of appeals in bankruptcy proceedings proper, and also in controversies arising in bankruptcy proceedings, may be reviewed on certiorari, pursuant to the act of March 3, 1891.

First Nat'l Bank Bk. v. Klug, 186 U. S. 204, 8 A. B. R. 14: "The words 'bankruptcy proceedings' are used in this section in contradistinction to controversies arising out of the settlement of the estates of bankrupts, as they are also so used in §§ 23 and 24. The certification referred to is that provided for

^{32.} *Houghton v. Burden*, 228 U. S. 161, 30 A. B. R. 16, quoted at § 3023. ^{33.} Bankr. Act, § 25 (d).

in §§ 5 and 6 of the act of March 3, 1891, and this case in that particular does not fall within those sections.

"Apart from § 25, the Circuit Court of Appeals has jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on certiorari, or in certain cases by appeal, under § 6 of the act of 1891."

But perhaps appeal is the exclusive remedy as to the allowance or rejection of a claim over \$2,000 under § 25 (b) (1) and (2).

The Bankruptcy Act does not authorize a review by the Supreme Court under § 24 (b).³⁴

§ 3025 1/10. No Reversal on Facts Where Two Lower Courts Have Concurred.—The Supreme Court will not reverse except for clear error where the two lower courts have concurred in their findings on the facts.³⁵

Manson v. Williams, 213 U. S. 453, 22 A. B. R. 22: "Both the district court and the circuit court of appeals have found as a fact that the brothers were partners, and that the goods belonged to the firm. In such cases this court, as a rule, will not disturb the findings, but it has done so in some instances. *Darlington v. Turner*, 202 U. S. 195, 220."

§ 3025 2/10. Question of Construction of Bankruptcy Act by Bankruptcy Courts.—Where the appellant insists upon a construction of the Bankruptcy Act which would defeat a lien, whilst the construction contended for by the appellee would give it validity, the construction of the Bankruptcy Act is directly involved in the determination of the question as to the validity of the lien.³⁶

§ 3025 3/10. Question of Construction of Supreme Court's Own General Orders in Bankruptcy.—The Supreme Court apparently will not take jurisdiction by certiorari or otherwise over questions of practice arising in bankruptcy even though involving the construction of its own General Orders in Bankruptcy, unless the question is reviewable for other reasons. This is most unfortunate; for the Bankruptcy Act is essentially a system of procedure for the administration of insolvent estates, and questions of practice and procedure of widest practical application throughout the United States and of greatest importance to right bankruptcy administration frequently are directly dependent on correct and uniform construction of the General Orders in Bankruptcy. It would seem that if the question of practice involved had been of sufficient importance to be made the subject of a General Order, it might be of sufficient importance, when applied by the courts, to warrant certiorari for its solution. Having issued the General Orders, it would seem reasonable that the Su-

³⁴. *Munsuri v. Fricker*, 222 U. S. 121, 27 A. B. R. 344.

³⁵. *Page v. Rogers*, 211 U. S. 575, 21

A. B. R. 496. Compare, similar proposition, ante, § 3009.

³⁶. *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1, quoted at § 3014.

preme Court should, by certiorari or otherwise, find some way to interpret them, for the sake of litigants in the various business communities of the country.

DIVISION 3.

REVIEW AND APPEALS FROM HIGHEST COURTS OF STATES TO UNITED STATES SUPREME COURT.

§ 3025 9/10. Question of Construction of Bankruptcy Act by State Court.—Where a construction of the Bankruptcy Act is involved, the United States Supreme Court may have jurisdiction to review the decisions of the highest state tribunal.³⁷

§ 3026. Decision of Highest State Court on Trustee's Action to Recover Assets Transferred Contrary to Bankruptcy Act, Presents Federal Question, Reviewable by Supreme Court.—Actions by trustees to recover assets asserted to belong to bankrupt estates by virtue of the bankruptcy statute, present a federal question, and give jurisdiction to the United States Supreme Court to review the decision of a state court of last resort therein.³⁸

Rector v. City Deposit Bank Co., 200 U. S. 405, 15 A. B. R. 336: "Both these contentions might well be disposed of by saying that the action was brought by a trustee appointed under the Bankrupt Law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States. * * * We think as the suit was brought by a trustee in bankruptcy in virtue of the power and authority conferred upon him by a law of the United States, the certificate makes clear the fact, if it were otherwise doubtful, that rights under the Bankrupt Law were relied upon and passed upon below. And as, this being true, the right of the trustee in bankruptcy to recover thus depended upon a law of the United States, there was clearly jurisdiction within the purview of § 709 of the Revised Statutes."

So, also, a case which involves the denial of a right claimed under the judgment of a federal court, or the proper construction of the Bankruptcy Act, may be reviewed by the United States Supreme Court.³⁹

The certificate of the state court of last resort cannot import a federal question into a record, where otherwise such question does not arise.⁴⁰ But such certificate may elucidate the determination as to whether a federal question exists.⁴¹

³⁷. *Acme Harvester Co. v. Beekman Co.*, 222 U. S. 300, 27 A. B. R. 262.

³⁸. *Eau Claire Nat'l Bk. v. Jackman*, 204 U. S. 522, 17 A. B. R. 680 (affirming 125 Wis. 478); *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1.

No review by Supreme Court of decision of highest court of state affirming holding of inferior state court, that order of bankruptcy court setting aside

exemptions is *res adjudicata*. *Smalley v. Laugenour*, 196 U. S. 93, 13 A. B. R. 692.

³⁹. *Acme Harvester Co. v. Beekman Co.*, 222 U. S. 300, 27 A. B. R. 262.

⁴⁰. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 A. B. R. 336.

⁴¹. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 A. B. R. 336.

§ 3027. State Court's Decision as to Scope of Prior State Judgment, Presents No Federal Question.—It is the conclusively settled doctrine that the scope and effect of a State judgment is peculiarly a question of State law, and, therefore, a decision relating only to such subject involves no Federal question.⁴²

So that where the only question involved is whether a purchaser from a trustee in bankruptcy pendente lite is bound by a State court's decree against the trustee, no Federal question is presented.⁴³

§ 3028. Decision Below Based on Well Settled General Law.—Where the decision of the court below has proceeded on well settled principles of general law, broad enough to sustain it without reference to the provisions of the Bankruptcy Act, appeal or writ of error to the Supreme Court of the United States will not be allowed, the validity of a treaty or statute of the United States, or of an authority exercised under the United States not being drawn in question, nor a State statute nor an authority exercised under a State being claimed to be repugnant to the constitution, treaties or laws of the United States.⁴⁴

Blake, trustee, *v. Openhym & Sons*, 216 U. S. 322, 23 A. B. R. 616: "An appeal [In *Chapman v. Bowen*, 207 U. S. 89, 18 A. B. R. 844], was allowed to this court by a judge of the Circuit Court of Appeals, which, on motion, was dismissed, on the ground that a writ of error from the highest court of the State to this court could not be maintained, because no validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question; nor the validity of a statute of, or any authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties, or laws of the United States; nor was any treaty, right, privilege, or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, and decided against it. It was further said that 'the decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act,'"

Thus, even where, after the filing of an involuntary bankruptcy petition, replevin had been instituted by leave of the state court against a state court receiver still in possession of the assets, who had thereupon given redelivery bond and retained the goods in specie (the receiver in bankruptcy, on receiving the goods in turn, agreeing to assume all liability on the redelivery bond), no federal question as to the paramount jurisdiction of the bankruptcy court over the res is presented, it being indubitably competent for the bankruptcy court to permit the prosecution of the replevin action in the state court, continuation of which prosecution was lawful up to the time it was forbidden by the injunction of the bankruptcy court.⁴⁵

^{42.} *Corbett v. Craven*, 215 U. S. 125, 23 A. B. R. 516.

^{43.} *Corbett v. Craven*, 215 U. S. 125, 23 A. B. R. 516.

^{44.} *Chapman v. Bowen*, 207 U. S. 89, 18 A. B. R. 844, quoted at § 3014.

^{45.} *Blake, trustee, v. Openhym & Sons*, 216 U. S. 322, 23 A. B. R. 616.

THE BANKRUPTCY ACT OF 1898
with Amendments of 1910

AN ACT

TO CREATE A UNIFORM SYSTEM OF BANKRUPTCY IN THE UNITED STATES AND TERRITORIES

(Adopted July 1, 1898; Amendments Approved February 5, 1903; June 15, 1906, and June 25, 1910). Portions Amended by Act of June 25, 1910, Shown in *Italics*.

CHAPTER I.

DEFINITIONS.

Section 1. Meaning of Words and Phrases.—*a* The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) “A person against whom a petition has been filed” shall include a person who has filed a voluntary petition; (2) “adjudication” shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) “appellate courts” shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) “bankrupt” shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) “clerk” shall mean the clerk of a court of bankruptcy; (6) “corporations” shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debt of the association; (7) “court” shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) “courts of bankruptcy” shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) “creditor” shall

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 1.—§§ 523, 645, 968, 1208, 1331, 1532, 1614, 1653, 2115, 2160, 2171, 2173, 2231.

Sec. 1 (a), Subd. (1).—§§ 54, 1464.

Sec. 1 (a), Subd. (2).—§ 1719½.

Sec. 1 (a), Subd. (4).—§§ 453, 1464.

Sec. 1 (a), Subd. (6).—§§ 79, 80.

Sec. 1 (a), Subd. (7).—§§ 523, 545, 1652, 1695, 2354½.

Sec. 1 (a), Subd. (8).—§ 28.

Sec. 1 (a), Subd. (9).—§§ 573, 584, 645, 1308, 2160.

include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 1 (a), Subd. (10).—§§ 672, 1133.

Sec. 1 (a), Subd. (11).—§§ 626, 627, 776, 2160, 2731, 2745, 2905.

Sec. 1 (a), Subd. (12).—§ 2414.

Sec. 1 (a), Subd. (13).—§§ 955, 1558.

Sec. 1 (a), Subd. (15).—§§ 72, 153, 1275, 1343, 1344, 1349, 2865.

Sec. 1 (a), Subd. (19).—§§ 59, 171, 480, 2126.

Sec. 1 (a), Subd. (22).—§ 2322.

Sec. 1 (a), Subd. (23).—§§ 748, 758.

assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Sec. 2. Courts and Jurisdiction.—That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereinafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 1 (a), Subd. (25).—§§ 124, 130, 965, 1009, 1332, 1335.

Sec. 1 (a), Subd. (27).—§ 47.

Sec. 2.—§§ 431, 858, 977, 1580, 1616, 1652, 1653, 1705, 1708, 1796, 1797, 1836, 1901, 1913, 1965, 2626, 2660, 2864, 2875, 2912, 2986.

Sec. 2, Subd. (1).—§§ 29, 30, 32, 34, 35.

Sec. 2, Subd. (2).—§§ 595, 811.

Sec. 2, Subd. (3).—§§ 358, 398¼, 377, 384, 385, 977, 1128, 1345, 2119, 2132.

filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) *authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this act*; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors,

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 2, Subd. (5).—§§ 358, 377, 385, 387, 388½, 1128, 1135, 1993, 2036, 2115, 2119.

Sec. 2, Subd. (6).—§§ 1653, 1682, 1796.

Sec. 2, Subd. (7).—§§ 760, 907, 977, 1115, 1484, 1580, 1653, 1654, 1796, 1797, 1819, 1832, 1957, 2219, 2869, 2875, 2883, 2902.

Sec. 2, Subd. (8).—§§ 1957, 2298, 2300.

Sec. 2, Subd. (9).—§ 2356.

Sec. 2, Subd. (10).—§§ 2839, 2862, 3001.

Sec. 2, Subd. (11).—§§ 1025, 1043, 1061, 2905.

Sec. 2, Subd. (13).—§§ 1856, 1859½.

Sec. 2, Subd. (14).—§ 374.

Sec. 2, Subd. (15).—§§ 22, 359, 373, 472½, 1115, 1653, 2300, 2697.

Sec. 2, Subd. (16).—§ 1856.

Sec. 2, Subd. (17).—§§ 878, 941, 944.

remove trustees for cause upon hearing and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; and (20) *exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.*

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

Sec. 3. Acts of Bankruptcy.—*a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay, or defraud his creditors or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State; of a Territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 2, Subd. (18).—§§ 417, 2001, 2658, 2660.

Sec. 2, Subd. (20).—§§ 367, 382½, 1913.

Sec. 3.—§§ 353, 390, 398, 1381, 1383, 1543, 1603, 1628.

Sec. 3 (a).—§§ 103, 1379.

Sec. 3 (a), Subd. (1).—§§ 104, 106, 109, 177.

Sec. 3 (a), Subd. (2).—§§ 113, 117, 120, 121, 124, 132, 175, 1394.

Sec. 3 (a), Subd. (3).—§§ 124, 133, 137, 139, 141, 142, 143, 1449.

Sec. 3 (a), Subd. (4).—§§ 145, 150, 151, 156, 157, 159, 160, 305.

Sec. 3 (a), Subd. (5).—§§ 161, 167.

Sec. 3 (b).—§§ 104, 127, 182, 185, 1133, 1379, 1381, 1383.

of giving the preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, of all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Sec. 4. Who May Become Bankrupts.—*a Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.*

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 3 (c).—§§ 116, 176, 177.

Sec. 3 (d).—§§ 172, 179, 181.

Sec. 3 (e).—§§ 336, 339, 346, 348, 350, 351, 352, 370, 397, 417, 1133, 1836, 2018.

Sec. 4.—§ 79.

Sec. 4 (a).—§§ 37, 1628, 2171, 2796.

b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

Sec. 5. Partners.—*a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.*

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 4 (b).—§§ 45, 45½, 46, 48, 65, 77, 79, 80, 181, 242, 413, 424, 433, 1511½, 1628.

Sec. 5.—§§ 79, 171, 172, 690, 867½, 1303, 2232, 2239, 2257, 2266, 2268, 2269, 2270, 2427, 2795, 2796, 2805.

Sec. 5 (a).—§§ 39, 56, 57, 59, 72, 2231.

Sec. 5 (b).—§§ 866, 2232.

Sec. 5 (c).—§§ 36, 2231.

Sec. 5 (d).—§ 2234.

Sec. 5 (e).—§ 2234.

Sec. 5 (f).—§§ 2231, 2238, 2269, 2271.

Sec. 5 (g).—§§ 2231, 2238, 2262½, 2269, 2270½, 2271, 2796.

h In the event of one or more but not all the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Sec. 6. Exemption of Bankrupts.—*a* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Sec. 7. Duties of Bankrupts.—*a* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition of a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, and one for the referee, and one for the trustee; and (9) when

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 5 (h).—§§ 65¼, 2231, 2232, 2251, 2796, 2797.

Sec. 6.—§§ 1005, 1022, 1025, 1048, 1087, 1133, 1166½, 1707, 2111.

Sec. 6 (a).—§ 2231.

Sec. 7.—§§ 1048, 1089, 1439, 1532, 2083, 2324, 2329 5/10, 2394, 2469, 2871, 2889.

Sec. 7, Subd. (1).—§§ 455, 463, 593, 1979, 2123, 2124, 2455.

Sec. 7 (a), Subd. (2).—§ 458.

Sec. 7 (a), Subd. (3).—§§ 459, 593, 820.

Sec. 7 (a), Subd. (4).—§§ 460, 1115.

Sec. 7 (a), Subd. (5).—§§ 460, 1114, 1115.

Sec. 7 (a), Subd. (6).—§ 459.

Sec. 7 (a), Subd. (7).—§§ 459, 819, 905.

Sec. 7 (a), Subd. (8).—§§ 461, 477, 481, 482, 1022, 1025, 1048, 1049, 1051, 1061, 2088, 2354½, 2538, 2541.

Sec. 7 (a), Subd. (9).—§§ 462, 915, 1525, 1527, 1538, 1547, 1556, 1557, 1558, 1577, 2124, 2323, 2324, 2354¼.

present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding

PROVIDED, HOWEVER, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence

Sec. 8. Death or Insanity of Bankrupts.—*a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: PROVIDED, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Sec. 9. Protection and Detention of Bankrupts.—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State; upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

b The judge may at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true, and that it is necessary, he shall order such marshal to keep such bankrupt in custody

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 8.—§§ 2420, 2867.

Sec. 8 (a).—§§ 54, 98, 99, 100, 101, 1117, 1166½, 1883, 2420.

Sec. 9.—§ 2115.

Sec. 9 (a).—§ 463.

Sec. 9 (b).—§§ 371, 373, 375, 472½, 1133.

not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Sec. 10. Extradition of Bankrupts.—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Sec. 11. Suits by and against Bankrupts.—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Sec. 12. Compositions, When Confirmed.—*a* A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall pre-

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 10 (a).—§ 374.

Sec. 11.—§§ 975, 1270 9/10, 1914, 2160, 2690, 2692, 2695, 2697, 2699.

Sec. 11 (a).—§§ 359, 1103, 1133, 1582, 2688, 2695, 2696, 2703.

Sec. 11 (b).—§§ 1645, 1648.

Sec. 11 (c).—§§ 899, 1640, 1641.

Sec. 11 (d).—§§ 1790, 1791, 2307.

Sec. 12.—§§ 416½, 418¾, 2361.

Sec. 12 (a).—§§ 403, 461½, 521½, 816½, 1405, 2117, 2348, 2349, 2353, 2354¼, 2355, 2356, 2358, 2359, 2361, 2363, 2371¾.

side; and action upon the petition for adjudication shall be delayed until it shall be determined whether such compensation shall be confirmed.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Sec. 13. Compositions, When Set Aside.—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Sec. 14. Discharges, When Granted.—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 12 (b).—§§ 1532, 1941, 2354½, 2337, 2360, 2361, 2365, 2381, 2384, 2388, 2394.

Sec. 12 (c).—§§ 2372, 2375.

Sec. 12 (d).—§§ 2387, 2396¼.

Sec. 12 (e).—§§ 2345, 2356, 2371½, 2389, 2390, 2391, 2394, 2396, 2397, 2398½.

Sec. 13.—§§ 2367½, 2400, 2404.

Sec. 14.—§§ 1025, 1840, 1858, 2420, 2431½, 2438, 2459, 2655, 2662, 2751.

Sec. 14 (a).—§§ 1840, 2331, 2349, 2376, 2418, 2420, 2423, 2424, 2427, 2457, 2459, 2468, 2469, 2477, 2502, 2608, 2626, 2662.

b The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Sec. 15. Discharges, When Revoked.—*a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Sec. 16. Co-Debtors of Bankrupts.—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 14 (b).—§§ 575, 593½, 898½, 940¼, 940½, 2060½, 2078, 2387, 2420, 2431½, 2447, 2459, 2467, 2467½, 2481, 2487, 2510, 2523, 2544, 2550, 2553, 2556, 2626, 2636, 2660, 2662.

Sec. 14 (b), Subd. (3).—§§ 2560, 2564, 2565, 2566, 2568, 2570, 2751. .

Sec. 14 (b), Subd. (5).—§§ 2571, 2572.

Sec. 14 (b), Subd. (6).—§§ 2367½, 2580, 2581.

Sec. 14 (c).—§§ 2349, 2556, 2662, 2750¾.

Sec. 15.—§§ 2401, 2481, 2806, 2807, 2813, 2815, 2816, 2819, 2820.

Sec. 16.—§ 1859½.

Sec. 16 (a).—§§ 662, 1510, 1511, 2795, 2796.

Sec. 17. Debts Not Affected by Discharge.—*a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or wilful and malicious injuries to the person or property of another; or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

Sec. 18. Process, Pleadings, and Adjudications.—*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien, in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

c All pleadings setting up matters of fact shall be verified under oath.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 17.—§§ 635, 2438, 2444, 2662, 2681, 2713, 2747, 2748, 2750½, 2751, 2754, 2754¼, 2785, 2795.

Sec. 17 (a).—§§ 1448, 1449, 1455, 2160, 2438, 2468, 2470, 2662, 2667, 2731, 2743, 2745.

Sec. 17 (a), Subd. (2).—§§ 635, 682, 1448, 1449, 2751, 2754, 2754¼, 2755, 2757, 2759, 2785.

Sec. 17 (a), Subd. (3).—§§ 2761, 2777, 2780.

Sec. 17 (a), Subd. (4).—§§ 2754¼, 2783, 2785, 2787.

Sec. 18.—§§ 425, 427.

Sec. 18 (a).—§§ 307, 308, 309, 310.

Sec. 18 (b).—§§ 315, 316, 317, 319, 323, 444.

Sec. 18 (c).—§§ 26, 447, 1084, 2430, 2584.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Sec. 19. Jury Trials.—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Sec. 20. Oaths, Affirmations.—*a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 18 (d).—§§ 70, 326, 403, 423, 2890.

Sec. 18 (e).—§§ 326, 424, 2890.

Sec. 18 (f).—§ 425.

Sec. 18 (g).—§§ 195, 196, 419, 2890.

Sec. 19 (a).—§§ 70, 405, 406, 408, 411, 690, 2894.

Sec. 20.—§§ 588, 614.

authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Sec. 21. Evidence.—*a* A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: PROVIDED, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

b The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 21.—§§ 1533, 1838.

Sec. 21 (a).—§§ 462, 1525, 1527, 1536, 1541, 1543, 1547, 1557, 1566, 1567, 1571, 1572½, 1839, 2007, 2327, 2329 5/10, 2354½.

Sec. 21 (b).—§ 1572½.

Sec. 21 (c).—§ 1572½.

Sec. 21 (e).—§ 1270 9/10.

Sec. 21 (f).—§ 2684.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Sec. 22. Reference of Cases after Adjudication.—*a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Sec. 23. Jurisdiction of United States and State Courts.—*a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b *Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.*

c The United States circuit court shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

Sec. 24. Jurisdiction of Appellate Courts.—*a* The Supreme Court of the United States, the circuit courts of appeals of the United States,

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 21 (g).—§ 2347.

Sec. 22.—§ 2354½.

Sec. 22 (a).—§§ 519, 521.

Sec. 22 (a), Subd. (2).—§ 522.

Sec. 23.—§§ 355, 977, 1580, 1652, 1653, 1696, 1796, 1811, 1864, 1865, 1885, 2824½, 2864, 2865½, 2874, 2875, 3025.

Sec. 23 (a).—§§ 1653, 1684.

Sec. 23 (b).—§§ 1414, 1652, 1653, 1684, 1686, 1687, 1688, 1689, 1696, 1716, 1722, 2875.

Sec. 24.—§§ 1653, 2011, 2824½, 2864, 2881, 2888, 2893, 2911, 2941, 2942, 2989, 3025.

Sec. 24 (a).—§§ 1796, 2864, 2865½, 2869, 2871, 2875, 2877, 2879¼, 2880, 2883, 2884, 2886, 2887, 2888½, 2902, 2912, 2914, 2915, 2920, 2920½, 2923, 2924, 2925, 2926, 2927, 2939, 2940, 2941, 2942, 2969, 2991½, 2992, 3013, 3016, 3017, 3023, 3023½.

and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Sec. 25. Appeals and Writs of Error.—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme courts of the Territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 24 (b).—§§ 1109, 1110, 1859½, 2864, 2871, 2874, 2875, 2876, 2879¼, 2880, 2883, 2884, 2886, 2887, 2888, 2888½, 2896½, 2901, 2902, 2911, 2914, 2915, 2918, 2920, 2928, 2929, 2930, 2932, 2933, 2935, 2937, 2939, 2939½, 2940, 2941, 2942, 2947, 2958, 2976, 2991½, 3013, 3025.

Sec. 25.—§§ 1109, 1228, 1653 2824½, 2827, 2864, 2869, 2870, 2871, 2887, 2888, 2902, 2905, 2911, 2912, 2928, 2930, 2942, 2944, 2989, 2992, 3013.

Sec. 25 (a).—§§ 1109, 1753, 1796, 2864, 2867, 2869, 2871, 2875, 2876, 2880, 2881½, 2883, 2887, 2888, 2888½, 2889, 2892, 2893, 2894, 2895, 2896½, 2897½, 2898, 2899, 2901, 2904, 2907, 2910, 2911, 2920, 2923, 2927, 2928, 2938, 2959, 2969, 2981, 2982, 2985, 2991½, 2992, 2999.

Sec. 25 (a), Subd. (3).—§§ 2076, 2869, 2902, 2907, 2909.

Sec. 25 (b).—§§ 2969, 3015½, 3023, 3023½.

Sec. 25 (b), Subd. (1).—§§ 2910, 3014, 3025.

Sec. 25 (b), Subd. (2).—§§ 3015, 3015½, 3025.

involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Sec. 26. Arbitration of Controversies.—*a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issue presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Sec. 27. Compromises.—*a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Sec. 28. Designation of Newspapers.—*a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Sec. 29. Offenses.—*a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 25 (c).—§ 2980.

Sec. 25 (d).—§§ 2865, 2900, 3013, 3024.

Sec. 26 (a).—§ 922.

Sec. 26 (b).—§ 924.

Sec. 26 (c).—§ 925.

Sec. 27 (a).—§§ 926, 930, 2357½.

Sec. 29.—§§ 1840, 2017, 2316, 2326, 2329 3/10, 2420, 2469, 2477, 2502, 2510, 2530, 2551, 2655.

Sec. 29 (a).—§§ 2316, 2502, 2551, 2556.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Sec. 30. Rules, Forms, and Orders.—*a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Sec. 31. Computation of Time.—*a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 29 (b), Subd. (1).—§§ 872, 2316, 2326, 2415, 2487, 2488, 2490, 2497, 2498, 2499, 2596.

Sec. 29 (b), Subd. (2).—§§ 2316, 2523, 2538, 2541.

Sec. 29 (b), Subd. (3).—§§ 2316, 2326.

Sec. 29 (b), Subd. (4).—§§ 1133, 2316, 2329 2/10.

Sec. 29 (b), Subd. (5).—§§ 2316, 2329 1/10.

Sec. 29 (c).—§ 2316.

Sec. 29 (c), Subd. (1).—§ 2316.

Sec. 29 (c), Subd. (2).—§ 2316.

Sec. 29 (c), Subd. (3).—§ 2316.

Sec. 29 (d).—§ 2316.

Sec. 30 (a).—§§ 25, 484, 503, 729, 1133.

Sec. 31.—§ 1454.

Sec. 31 (a).—§§ 141, 189, 1375.

Sec. 32. Transfer of Cases.—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Sec. 33. Creation of Two Offices.—*a* The offices of referee and trustee are hereby created.

Sec. 34. Appointment, Removal and Districts of Referees.—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Sec. 35. Qualifications of Referees.—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Sec. 36. Oaths of Office of Referees.—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Sec. 37. Number of Referees.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 32.—§ 297.

Sec. 33.—§ 2750½.

Sec. 33 (a).—§ 497.

Sec. 34 (a).—§§ 498, 499, 500, 501.

Sec. 35 (a).—§ 502.

Sec. 35 (a), Subd. (4).—§ 501.

Sec. 36.—§§ 477½, 523.

Sec. 36 (a).—§ 503.

Sec. 37.—§§ 501, 523, 1133.

Sec. 38. Jurisdiction of Referees.—*a* Referees respectively are hereby invested, subject always to a review by the judge within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Sec. 39. Duties of Referees.—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividends sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep,

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 38.—§§ 1652, 2007, 2660.

Sec. 38 (a).—§§ 425, 523, 526, 1580, 2335, 2626, 2839.

Sec. 38 (a), Subd. (1).—§ 524.

Sec. 38 (a), Subd. (3).—§§ 337, 379, 525.

Sec. 38 (a), Subd. (4).—§§ 425, 523, 2373, 2391, 2625, 2626, 2660, 2820.

Sec. 38 (a), Subd. (5).—§§ 1579, 2006, 2007.

Sec. 39.—§§ 2626, 2660, 2840, 2974.

Sec. 39 (a), Subd. (1).—§ 507.

Sec. 39 (a), Subd. (2).—§§ 479, 502, 1068.

Sec. 39 (a), Subd. (3).—§§ 509, 915.

Sec. 39 (a), Subd. (5).—§§ 511, 2855, 2856, 2857.

Sec. 39 (a), Subd. (6).—§ 512.

Sec. 39 (a), Subd. (7).—§ 513.

perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective officers are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Sec. 40. Compensation of Referees.—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commission shall be paid to the referee.

Sec. 41. Contempts before Referees.—*a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 39 (a), Subd. (8).—§ 514.

Sec. 39 (a), Subd. (9).—§§ 515, 915, 2856.

Sec. 39 (a), Subd. (10).—§ 516.

Sec. 39 (b), Subd. (1).—§ 504.

Sec. 39 (b), Subd. (3).—§§ 505, 1955¼.

Sec. 40.—§§ 2036, 2103, 2105, 2188.

Sec. 40 (a).—§§ 285, 2102, 2103, 2106, 2331.

Sec. 40 (c).—§ 526.

Sec. 41.—§§ 1569, 2330, 2331½, 2839.

Sec. 41 (a), Subd. (1).—§§ 2334, 2336.

Sec. 41 (a), Subd. (2).—§ 2334.

thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law; PROVIDED, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, on in the presence of, the court.

Sec. 42. Records of Referees.—*a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Sec. 43. Referee's Absence or Disability.—*a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Sec. 44. Appointment of Trustees.—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 41 (a), Subd. (3).—§ 2334.

Sec. 41 (a), Subd. (4).—§ 2334.

Sec. 41 (b).—§§ 2330, 2331, 2336, 2338.

Sec. 42.—§§ 477½, 523, 560.

Sec. 43.—§ 1133.

Sec. 44.—§ 1133.

Sec. 44 (a).—§§ 584, 862, 863, 869, 870, 871, 873, 875, 895, 948, 949, 2314.

reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Sec. 45. Qualification of Trustees.—*a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Sec. 46. Death or Removal of Trustees.—*a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Sec. 47. Duties of Trustees.—*a* Trustee shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) *collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied;* (3) deposits all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 45.—§§ 879, 881, 2780.

Sec. 46 (a).—§ 947.

Sec. 47.—§§ 905, 915, 1032, 1034, 1138, 1143, 1248.

Sec. 47 (a), Subd. (1).—§ 906.

Sec. 47 (a), Subd. (2).—§§ 783, 907, 908, 951, 1022, 1034, 1035, 1048, 1072, 1073, 1074, 1075, 1104, 1106, 1107, 1137, 1138, 1139, 1141, 1143, 1150, 1155, 1166¼, 1207, 1208, 1210, 1212, 1225¾, 1228, 1228½, 1233, 1239, 1240, 1242, 1243½, 1248, 1270, 1270 1/10, 1270 2/10, 1270¾, 1270 4/10, 1270 5/10, 1370, 1379, 1380, 1384, 1731, 1732, 1878, 1879, 1883, 1974½, 2221.

Sec. 47 (a), Subd. (3).—§ 909.

Sec. 47 (a), Subd. (4).—§ 912.

Sec. 47 (a), Subd. (5).—§ 914.

Sec. 47 (a), Subd. (6).—§ 916.

amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estate; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

Sec. 48. Compensation of Trustees, Receivers and Marshals.

—a Trustee shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required, from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 47 (a), Subd. (7).—§§ 917, 2297.

Sec. 47 (a), Subd. (8).—§§ 917, 2297.

Sec. 47 (a), Subd. (9).—§ 918.

Sec. 47 (a), Subd. (10).—§§ 917, 2285.

Sec. 47 (a), Subd. (11).—§§ 1022, 1048, 1073, 1074, 1075, 1248.

Sec. 47 (b).—§§ 874, 876.

Sec. 47 (c).—§ 2108.

Sec. 48.—§§ 358, 398, 418½, 418¾, 1093½, 1971, 2011, 2036, 2059, 2103, 2105, 2110, 2111, 2115, 2117, 2119, 2119¾, 2189.

Sec. 48 (a).—§§ 285, 2105, 2108, 2108½, 2109, 2110, 2115, 2119¾.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may in its discretion, withhold all compensation from any trustee who had been removed for cause.

d *Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commission upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustee from property turned over in kind by them to the trustees, as the court may allow not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked shall be given to creditors in the manner indicated in section fifty-eight of this act.*

e *Where the business is conducted by trustee, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and*

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 48 (b).—§§ 2114, 2119¾.

Sec. 48 (c).—§§ 947½, 2113.

Sec. 48 (d).—§§ 390½, 565¾, 1996, 2115, 2118, 2119, 2119¼, 2119½, 2129, 2132.

Sec. 48 (e).—§§ 388½, 565¾, 1996, 2115, 2118, 2119, 2119¼, 2119½, 2119¾.

less than one thousand five hundred dollars, two per centum on moneys less than one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked shall be given to creditors in the manner indicated in section fifty-eight of this act.

Sec. 49. Accounts and Papers of Trustees.—*a* The accounts and papers of trustees shall be opened to the inspection of officers and all parties in interest.

Sec. 50. Bonds of Referees and Trustees.—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 49 (a).—§ 915.

Sec. 50 (a).—§ 503.

Sec. 50 (b).—§ 877.

Sec. 50 (c).—§ 877.

Sec. 50 (e).—§ 877.

Sec. 50 (f).—§ 877.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond as herein provided and within the time limited, he shall be denied to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Sec. 51. Duties of Clerks.—*a* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Sec. 52. Compensation of Clerks and Marshals.—*a* Clerk shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the estate where an adjudi-

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 50 (g).—§ 877.

Sec. 50 (k).—§ 877.

Sec. 51.—§§ 287, 290, 2023, 2036.

Sec. 52.—§§ 285, 358, 2036.

Sec. 52 (b).—§§ 2117, 2129.

cation in bankruptcy is made, except as herein otherwise provided, for the performance of their services in the proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Sec. 53. Duties of Attorney-General.—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Sec. 54. Statistics of Bankruptcy Proceedings.—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Sec. 55. Meetings of Creditors.—*a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 54.—§ 1133.

Sec. 55 (a).—§§ 591, 592, 2354½.

Sec. 55 (b).—§ 2354½.

Sec. 55 (c).—§ 571.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Sec. 56. Voters at Meetings of Creditors.—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the value of such securities or priorities, and then only for such excess.

Sec. 57. Proof and Allowance of Claims.—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 55 (e).—§ 2354½.

Sec. 56.—§§ 584, 888, 1532.

Sec. 56 (a).—§§ 205, 572, 940½.

Sec. 56 (b).—§§ 576, 634.

Sec. 57.—§§ 240, 259, 595, 603, 729, 730, 734, 758½, 759, 822, 845, 1494, 2139, 2163, 2223, 2394, 2395.

Sec. 57 (a).—§§ 447, 594, 595, 597, 603, 606, 614, 720, 728, 767¼, 844, 1196, 2139.

Sec. 57 (b).—§§ 602, 844.

Sec. 57 (c).—§§ 447, 577, 595, 720, 729, 2358.

by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceeding at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g The claims of creditors who have received preferences, voidable under section sixty, subdivision *b*, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 57 (d).—§§ 447, 595, 720, 813, 816, 818, 819, 824, 2354½.

Sec. 57 (e).—§§ 632, 634, 728, 751, 763, 767, 767¼, 1314, 2139.

Sec. 57 (f).—§§ 813, 844, 1314.

Sec. 57 (g).—§§ 119, 205, 578, 632, 716, 727½, 768, 769, 770, 773½, 775, 1276, 1314, 1401, 1421.

Sec. 57 (h).—§§ 634, 751, 755, 759, 760, 762, 762½, 767, 767¼, 767½, 1314, 1387, 1913.

Sec. 57 (i).—§§ 613, 644, 645, 1516.

Sec. 57 (j).—§§ 683½, 691, 2150.

actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: PROVIDED, That the right of infants and insane persons without guardians, without notice of the proceedings may continue six months longer

Sec. 58. Notices to Creditors.—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) *all hearings upon applications for the confirmation of compositions*; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustees, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) *there shall be thirty days' notice of all applications for the discharge of bankrupts*.

b Notice to creditors of the first meeting shall be published at least once

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 57 (k).—§§ 447, 595, 811, 817, 819, 824, 838, 861.

Sec. 57 (l).—§§ 595, 813.

Sec. 57 (n).—§§ 641, 686, 716, 717, 717½, 719, 719½, 720, 723, 724, 727½, 728, 729, 730, 731, 735, 737¾, 744½, 775, 1178, 1614, 2139, 2161, 2358, 3000.

Sec. 58.—§§ 386½, 928, 934, 940½, 1706, 1869, 1942, 1954, 2431½.

Sec. 58 (a).—§§ 419, 565, 1535, 1938, 2053, 2288, 2296.

Sec. 58 (a), Subd. (2).—§§ 565½, 2371, 2431.

Sec. 58 (a), Subd. (3).—§ 565½.

Sec. 58 (a), Subd. (4).—§ 1944.

Sec. 58 (a), Subd. (5).—§§ 2215, 2289.

Sec. 58 (a), Subd. (6).—§ 2296.

Sec. 58 (a), Subd. (8).—§ 419.

Sec. 58 (a), Subd. (9).—§§ 565¼, 2431½.

Sec. 58 (b).—§§ 568, 569.

and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

Sec. 59. Who May File and Dismiss Petitions.—*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g *A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before en-*

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 58 (c).—§ 570.

Sec. 59 (b).—§§ 197, 198, 220, 227, 240, 444, 632, 672.

Sec. 59 (c).—§§ 190, 283.

Sec. 59 (d).—§§ 204, 207, 269, 672.

Sec. 59 (e).—§§ 199, 215, 269.

Sec. 59 (f).—§§ 210, 269, 317, 319, 323, 326, 672.

Sec. 59 (g).—§ 419.

tertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.

Sec. 60. Preferred Creditors.—*a* A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preformance, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 60.—§§ 269, 1138, 1277, 1314, 1342, 1353½, 1381, 1383, 1385, 1395, 1397, 9399, 1494, 1497, 1498, 1652, 2085, 2087, 2097, 2205, 2223, 2270½.

Sec. 60 (a).—§§ 119, 123, 124, 126, 127, 128, 205, 446, 1124, 1137, 1179, 1232, 1270 5/10, 1276, 1277 1282 1291, 1294, 1295, 1296, 1307½, 1308, 1314, 1342, 1367, 1368, 1369, 1377, 1379, 1379½, 1379¾, 1381, 1383, 1384, 1385, 1395, 1403, 1410, 1414, 1416, 1452, 1453, 1459, 2094.

Sec. 60 (b).—§§ 188½, 205, 393, 445, 727½, 977, 1133, 1137, 1179, 1181, 1270, 1275, 1276, 1307, 1353½, 1364½, 1379, 1379½, 1379¾, 1381, 1382, 1383, 1384, 1393, 1394, 1395, 1400, 1401, 1403, 1405, 1412, 1413, 1414, 1429, 1459, 1477, 1497, 1580, 1688, 1689, 1690, 1692, 1764, 1791, 2874, 2909, 2927.

Sec. 60 (c).—§§ 1416, 1419, 1422, 1423 1425½.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

Sec. 61. Depositories for Money.—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Sec. 62. Expenses of Administering Estates.—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Sec. 63. Debts Which May Be Proved.—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 60 (d).—§§ 1683½, 2011, 2090, 2094, 2095, 2096, 2097, 2099, 2102, 2907.

Sec. 61.—§ 909.

Sec. 62.—§§ 517, 1093, 2291.

Sec. 62 (a).—§§ 2028, 2029.

Sec. 63.—§§ 625, 629, 644, 645, 653, 656, 749, 776, 810¾, 813, 814, 2160, 2731, 2750½.

Sec. 63 (a).—§§ 625, 628, 636, 639½, 640, 682, 692, 702, 705, 706, 711, 1448, 1449, 1455, 2731, 2732, 2750½.

Sec. 63 (a), Subd. (1).—§§ 598, 599, 640, 670, 672, 673, 676, 678, 679, 758½, 1133, 1521.

Sec. 63 (a), Subd. (2).—§§ 672, 691, 1133.

the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Sec. 64. Debts Which Have Priority.—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; and, where property of the bankrupt transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 63 (a), Subd. (3).—§§ 672, 691, 693, 1133.

Sec. 63 (a), Subd. (4).—§§ 627, 672, 674, 694, 1449.

Sec. 63 (a), Subd. (5).—§§ 672, 682, 695, 696, 699, 700, 1104, 1123, 1448, 1449, 1647, 2704, 2713.

Sec. 63 (b).—§§ 232, 636, 674, 704, 705, 706, 711, 712, 717, 1647.

Sec. 64.—§§ 607, 730, 845, 1387, 2012, 2019, 2085, 2087, 2088, 2090, 2139, 2160, 2169, 2183, 2187, 2188.

Sec. 64 (a).—§§ 702, 2141, 2144, 2150, 2156, 2157, 2159, 2161.

Sec. 64 (b).—§§ 402, 1093, 1708, 2017, 2053, 2060, 2089, 2090, 2093, 2096, 2103, 2141, 2169, 2864, 2907.

Sec. 64 (b), Subd. (1).—§ 2013.

Sec. 64 (b), Subd. (2).—§§ 399, 400, 691, 1485, 1619, 1708, 1712, 1713, 1714, 1950, 2015, 2016, 2018, 2060.

Sec. 64 (b), Subd. (3).—§§ 2011, 2063, 2065, 2077, 2078, 2089, 2090, 2097.

bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Sec. 65. Declarations and Payment of Dividends.—*a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: PROVIDED, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed; And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 64 (b), Subd. (4).—§§ 1133, 2141, 2164, 2165, 2167, 2170, 2171, 2172, 2178, 2179, 2180, 2181, 2186, 2194, 2203.

Sec. 64 (b), Subd. (5).—§§ 5, 150, 1160, 1242, 1266, 1270, 1441, 1485, 1619, 1631, 2014, 2018, 2141, 2170, 2179, 2181, 2186, 2187, 2188, 2189, 2190, 2194, 2196, 2197, 2198, 2202, 2203, 2204, 2205.

Sec. 65 (a).—§§ 1532, 2206, 2209, 2780.

residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

Sec. 66. Unclaimed Dividends.—*a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: PROVIDED, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Sec. 67. Liens.—*a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 67.—§§ 1032, 1138, 1139, 1227½, 1242, 1244, 1270, 1242, 1437, 1438, 1441, 1449, 1473, 1494, 1603, 1629, 1652, 2094.

Sec. 67 (a).—§§ 1137, 1138, 1143, 1208, 1210, 1221, 1227¾, 1257, 1269, 1270, 1507, 1603, 1896.

Sec. 67 (b).—§§ 1137, 1143, 1208, 1209, 1227¼, 1227¾, 1270, 1489, 1712.

Sec. 67 (c).—§§ 977, 1133, 1137, 1138, 1143, 1242, 1270 9/10, 1441, 1449, 1463, 1478, 1485, 1491, 1491¼, 1492, 1603, 2198.

Sec. 67 (c), Subd. (1).—§§ 1491, 1603.

Sec. 67 (c), Subd. (2).—§§ 1441, 1491, 1603.

Sec. 67 (c), Subd. (3).—§§ 1225¾, 1441, 1491, 1603, 1807, 2036.

the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with the like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 67 (d).—§§ 758½, 760, 1143, 1209, 1500, 1501, 1993, 2049, 2186, 2678.

Sec. 67 (e).—§§ 727½, 1095, 1112, 1126, 1133, 1137, 1138, 1143, 1208, 1209, 1210, 1211½, 1215, 1216, 1217, 1258, 1414, 1454, 1493, 1494, 1496, 1497, 1498, 1499, 1499½, 1580, 1603, 1652, 1688, 1689, 1690, 1692, 1695, 1746, 2874, 2927, 2936, 3014.

Sec. 67 (f).—§§ 359, 400, 579, 682, 693, 777, 1070, 1100, 1112, 1126, 1133, 1137, 1138, 1139, 1143, 1160, 1208, 1210, 1225¾, 1243¾, 1429, 1436, 1439, 1441, 1441½, 1443, 1444, 1446, 1447, 1447½, 1448, 1449, 1452, 1453, 1455, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1472, 1474, 1477, 1478, 1480, 1481, 1482, 1485, 1489, 1491, 1491¾, 1492, 1501, 1511, 1524, 1585, 1586, 1600, 1603, 1605, 1712, 1714, 1796, 1828, 2018, 2116, 2197, 2198.

within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: PROVIDED, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Sec. 68. Set-Offs and Counterclaims.—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Sec. 69. Possession of Property.—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 68.—§§ 1170, 1180, 1185, 1188, 1341, 1416.

Sec. 68 (a).—§§ 1180, 1297, 1341.

Sec. 68 (b).—§§ 1133, 1203.

Sec. 68 (b), Subd. (1).—§ 1177.

Sec. 68 (b), (2).—§ 1182.

Sec. 69.—§§ 390, 397, 1128, 1652, 1836, 2018.

Sec. 69 (a).—§§ 336, 339, 351, 377, 390, 397, 1270 9/10, 1807

to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Sec. 70. Title to Property.—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: PROVIDED, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 70.—§§ 451, 672, 872, 951, 952, 965, 1004, 1005, 1011, 1015, 1019, 1024, 1032, 1070, 1120, 1128, 1135, 1138, 1139, 1166¼, 1207, 1209, 1258, 1270, 1270 2/10, 1447½, 1452, 1493, 1603, 1626, 2347.

Sec. 70 (a).—§§ 951, 954, 965, 1003, 1004, 1005, 1006, 1011, 1015, 1019, 1024, 1025, 1032, 1112, 1117, 1119, 1120, 1137, 1138, 1143, 1208, 1209, 1270 9/10, 1491, 1630, 2324½.

Sec. 70 (a), Subd. (1).—§§ 951, 955, 1137, 1548, 1557, 1558.

Sec. 70 (a), Subd. (2).—§§ 951, 958, 1137, 2324½.

Sec. 70 (a), Subd. (3).—§§ 951, 961, 1137.

Sec. 70 (a), Subd. (4).—§§ 951, 1137, 1138, 1208, 1209, 1210, 1212, 1215½, 1216, 1498.

Sec. 70 (a), Subd. (5).—§§ 100, 951, 952, 963, 964, 965, 966, 967, 1002, 1003, 1004, 1008, 1009, 1013, 1025, 1134, 1136, 1137, 1143, 1270, 1270 9/10.

Sec. 70 (a), Subd. (6).—§§ 951, 976, 1019, 1213¾.

Sec. 70 (b).—§§ 1221, 1630, 1924, 1950, 1956, 1958.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title of all the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be removed or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

Sec. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: PROVIDED, That said bankruptcy indexes and dockets shall at all times be opened to inspection and examination by all persons or corporations without any fee or charge therefor.

Sec. 72. *That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act.*

The Time When This Act Shall Go into Effect.—*a* This act shall go into full force and effect upon its passage: PROVIDED, HOWEVER, That no petition for voluntary bankruptcy shall be filed within one month of

Sections of Bankruptcy Act referred to or construed in this treatise:

Sec. 70 (d).—§ 1155.

Sec. 70 (e).—§§ 977, 1137, 1138, 1139, 1143, 1208, 1209, 1210, 1215½, 1216, 1221, 1226, 1270, 1270 9/10, 1414, 1580, 1684, 1687, 1688, 1689, 1690, 1692, 1716, 1738, 2874, 2912, 2927, 2941.

Sec. 70 (f).—§ 2347.

Sec. 71.—§ 1626.

Sec. 72.—§§ 358, 388½, 398½, 418¾, 522½, 2029, 2059, 2103, 2117.

the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

[Section 14 of the amendatory act of 1910 provides as follows:

"That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said act approved July first, eighteen hundred and ninety-eight, as amended by said act approved February fifth, nineteen hundred and three, and as further amended by said act approved June fifteenth, nineteen hundred and six."]

THE BANKRUPTCY ACTS OF 1867, 1841
AND 1800.

THE BANKRUPTCY ACT OF 1867.

(WITH AMENDMENTS.)

COURTS OF BANKRUPTCY.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this Act.

The said courts shall be always open for the transaction of business under this Act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting in chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

And the jurisdiction hereby conferred shall extend—

To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy;

To the collection of all the assets of the bankrupt;

To the ascertainment and liquidation of the liens and other specific claims thereon;

To the adjustment of the various priorities and conflicting interests of all parties;

And to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors;

And to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

(*Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt resides, having jurisdiction of claims of such nature and amount.)*

The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in equity.

Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding court, they shall have given notice, as well as at the places designated by law for holding such courts.

§ 2. *And be it further enacted*, That the several Circuit Courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this Act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.

*So amended by act of 22 June, 1874, ch. 390, § 2, 18 Stat. 178.

The powers and jurisdiction hereby granted may be exercised either by said court, or by any justice thereof, in term time or vacation.

* Said Circuit Courts shall also have *concurrent jurisdiction* with the District Courts of the same district, of all suits at law, or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in such assignee;

(R. S., § 4979.—The several Circuit Courts shall have, within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a Circuit Court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee.)

But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

OF THE ADMINISTRATION OF THE LAW IN COURTS OF BANKRUPTCY.

§ 3. *And be it further enacted*, That it shall be the duty of the judges of the District Courts of the United States within and for the several districts to appoint in each Congressional District in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the District Court in the performance of his duties under this Act.

No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the State in which he resides.

Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof.

And he shall, in open court, take and subscribe the oath prescribed in the act entitled "An Act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also, that he will not during his continuance in office be, directly or indirectly, interested in, or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy in either the District or Circuit Court in his district.

§ 4. *And be it further enacted*, That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty—

- To make adjudication of bankruptcy;
- To receive the surrender of any bankrupt;
- To administer oaths in all proceedings before him;
- To hold and preside at meetings of creditors;

*As amended by act of June 22, 1874, this paragraph appears in R. S., § 4979.

To take proof of debts;

To make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case;

To audit and pass accounts of assignees;

To grant protection;

To pass the last examination of any bankrupt in cases whenever the assignee or a creditor does not oppose;

And to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct;

And he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the District Court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute book, to be kept in his office;

And any register of the court may act for any other register thereof.

Provided, however, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge;

But in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

*No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the Circuit or District Court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts.

(R. S., Sec. 4996.* No register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.)

The fees of said registers, as established by this Act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this Act.

§ 5. *And be it further enacted,* That the judge of the District Court may direct a register to attend at any place within the district, for the purpose of hearing such voluntary applications under this Act as may not be opposed; of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this

*So amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

Act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be settled by said court in accordance with the rules prescribed under the tenth section of this Act, and paid out of the assets of the estate in respect of which such register has so acted; or, if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge; and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the District Court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents:

Provided always, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing and be signed by him, and shall be filed in the clerk's office as part of the proceedings.

Such register shall be subject to removal by the judge of the District Court;

And all vacancies occurring by such removal, or by resignation, change of residence, death, or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

§ 6. *And be it further enacted,* That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approved thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

In any bankruptcy, or in any other proceedings within the jurisdiction of the court under this Act, the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court; and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this Act.

The parties may also, if they think fit, agree, that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

§ 7. *And be it further enacted,* That parties and witnesses summoned before a register shall be bound to attend, in pursuance of such summons, at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna;

And all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury.

If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination; and such person shall also be liable to be punished for contempt.

§ 8. *And be it further enacted*, That appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts from said District Courts in cases at law under the jurisdiction created by this act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district; but no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from.

The appeal shall be entered at the term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same.

But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the District Court as if no appeal had been taken.

And no appeal shall be allowed unless the appellant, at the time of claiming the same, shall give bond in manner now required by law in cases of such appeals.

No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

§ 9. *And be it further enacted*, That in cases arising under this Act, no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed* (two thousand dollars).

§ 10. *And be it further enacted*, That the Justices of the Supreme Court of the United States, subject to the provisions of this Act, shall frame general orders for the following purposes:

For regulating the practice and procedure of the District Courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this Act;

For regulating the duties of the various officers of said courts;

(†For regulating the fees payable, and the charges and costs to be allowed, except such as are established by this Act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings).

For regulating the fees payable and the charges and costs to be allowed, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this Act into effect.

(‡And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided.)

*Amended by act of Feb. 6th, 1875, ch. 77, sec. 3, to \$5,000.00.

†Amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184, to read as in the following paragraph^h.

‡So added by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

After such general orders shall have been so framed, they, or any of them, may be rescinded or varied, and other general orders may be framed in manner aforesaid;

And all such general orders so framed shall, from time to time, by the Justices of the Supreme Court, be reported to Congress, with such suggestions as said Justices may think proper.

VOLUNTARY BANKRUPTCY—COMMENCEMENT OF PROCEEDINGS.

§ 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this Act exceeding the amount of three hundred dollars, shall apply by petition, addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of this Act;

And shall annex to his petition a schedule (words "and inventory and valuation" added by act of June 22, 1874), verified by oath before the court, or before a register in bankruptcy, or before one of the commissioners of the Circuit Court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and, if not known, the fact to be so stated, and the sum due to each creditor; also the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for payment of the same;

And shall also annex to his petition an accurate inventory,* verified in like manner, of all his estate, both real and personal, assignable under this Act, describing the same, and stating where it is situated, and whether there are any, and, if so, what encumbrances thereon;

The filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt;

Provided, That all citizens of the United States petitioning to be declared bankrupt shall, in filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy.

And the judge of the District Courts, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

*"And valuation," so amended Act of June 22, 1874.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

(*But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper, or newspapers, to all such creditors, whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.)

OF ASSIGNMENTS AND ASSIGNEES.

§ 12. *And be it further enacted,* That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

§ 13. *And be it further enacted,* That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts.

If no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees.

If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy.

All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties;

The bond shall be approved by the judge or register by his endorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party.

If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

§ 14. *And be it further enacted,* That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the com-

*So amended by act of 22 June, 1874, ch. 390, sec. 5, 18 Stat. 179.

commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings:

Provided, however, That there shall be excepted from the operation of the provisions of this section—

The necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars;

And also the wearing apparel of such bankrupt, and that of his wife and children;

And the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States;

And such other property as now is, or hereafter shall be exempted from attachment, or seizure, or levy on execution by the laws of the United States;

And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four:

Provided, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees;

And in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Act;

And the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court:

And provided further, That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations, and otherwise valid, and duly recorded, pursuant to any statute of the United States or of any State, shall be invalidated or affected hereby.

And all the property conveyed by the bankrupt in fraud of his creditors;

All rights in equity, choses in action, patents and patent rights and copy-rights;

All debts due him, or any person for his use, and all liens and securities therefor;

And all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention or of injury to the property of the bankrupt; and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee;

And he may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name,

in the same manner and with the like effect as they might have been presented or defended by such bankrupt.

And a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as hereinbefore mentioned; but no property held by the bankrupt in trust shall pass by such assignment.

No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tending amends, should he see fit to do so.

No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon;

And no suit in which the assignee is a party shall be abated by his death or removal from office, but the same may be prosecuted and defended by his successors, or by the surviving or remaining assignee, as the case may be.

The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other encumbrances.

The debtor shall also, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper, to enable the assignee to possess himself fully of all the assets of the bankrupt.

The assignee shall immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspaper as shall, for that purpose, be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside,

And shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded;

And the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

§ 15. *And be it further enacted*, That the assignee shall demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this Act;

And he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors;

(R. S., sec. 5062a (22 June, 1874, ch. 390, sec. 1, 18 Stat. 171.)—That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt. *Provided*, That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.)

But upon petition of any person interested, and for cause shown, the court

may make such order concerning the time, place, and manner of sale, as will, in its opinion, prove to the interest of the creditors;

And the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

(R. S., sec., 5062b (22 June, 1874, ch. 390, sec. 4, 18 Stat. 178).)—That, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court on application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such installments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner, fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell, or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services, in connection with such bankrupt's estate, and upon conviction thereof, before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. That the assignee shall report under oath, to the court, at least as often as once in three months, the condition of the estate in his charge and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the account of any assignee, he shall be required to account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall willfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, he

punished by imprisonment in the penitentiary not less than one and not more than five years.)

§ 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered, and no assignment had been made.

If, at the time of the commencement of the proceedings in bankruptcy an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him.

No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving, or remaining, or new assignee, as the case may be, he shall be admitted to prosecute the suit, in like manner and with like effect as if it had been originally commenced by him.

In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

§ 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts.

When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court.

He shall be allowed, and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and may, under such direction, compound and settle any such controversy by agreement with the other party, as he thinks proper and most for the interest of the creditors.

§ 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient.

At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee.

An assignee may, with the consent of the judge, resign his trust, and be discharged therefrom.

Vacancies caused by death, or otherwise, in the office of assignee may be filled by appointment of the court, or, at its discretion, by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof, in writing, to all known creditors, and by such person as the court shall direct.

The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

When, by death, or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate.

And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

No person who has received any preference contrary to the provisions of this Act shall vote for or be eligible as assignee.

But no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

OF DEBTS AND PROOF OF CLAIMS.

§ 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt.

All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.

If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such a manner as

the court shall order, and he shall be allowed to prove for the amount so ascertained.

Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced.

And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules.

Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the Court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

No debts other than those above specified shall be proved or allowed against the estate.

§ 20. *And be it further enacted*, That in all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition.

(*Or in case of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.)

When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct;

Or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt.

If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

§ 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against

*So added by act of 22 June, 1874, ch. 390, sec. 6, 18 Stat. 179.

the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby.

(*But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.)

And no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined.

And any such suit or proceeding shall, upon the application of the bankrupt be stayed to await the determination of the court in bankruptcy on the question of the discharge: *Provided*, There be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge: *And provided, also*, That if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid.

If any Bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstances that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

§ 22. *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial districts where such creditors, or either of them, reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district.

(Sec. 5076 a (22 June 1874, ch. 390, sec. 20 18 Stat. 186).—That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.)

(Sec. 5076 b (Act of August 15, 1876, ch. 304, 19 Stat. 206).—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do.)

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath, or solemn affirmation, before the proper register or commissioner, setting forth—

The demand;

The consideration thereof;

*So added by act of 22 June, 1874, ch. 390, sec. 7, 18 Stat. 179.

Whether any and what securities are held therefor

And whether any and what payments have been made thereon;

That the sum claimed is justly due from the bankrupt to the claimant;

That the claim has not, nor has any other person for his use, received any security or satisfaction whatever other than that by him set forth;

That the claim was not procured for the purpose of influencing the proceedings under this act;

And that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim, or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled;

And no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Such oath, or solemn affirmation shall be made by the claimant testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge, or, if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require further pertinent evidence, either for or against the admission of the claim.

Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer.

If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time and receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors.

The court may, on the application of the assignee, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

§ 23. *And be it further enacted,* That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Any person who, after the approval of this Act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this Act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers;

And any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

§ 24. *And be it further enacted,* That a supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court rejecting his claim, in whole or in part, shall, upon entering his appeal in the Circuit Court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in an action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

A bill of exchange, promissory note, or other instrument used in evidence upon the proof of a claim, and left in court, or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall endorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

§ 25. *And be it further enacted,* That when it appears to the satisfaction of the court that the estate of the debtor or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of;

And whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of;

And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts.

But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

§ 26. *And be it further enacted,* That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating—

To the disposal or condition of his property;

To his trade and dealings with others, and his accounts concerning the same;

To all debts due to or claimed from him;

And to all other matters concerning his property and estate, and the due settlement thereof according to law;

Which examination shall be in writing, and shall be signed by the bankrupt and be filed with the other proceedings.

And the court may, in like manner, require the attendance of any other person as a witness; and if such person shall fail to attend on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy for examination as such witness.

If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be; or may direct the examination to be had, taken, and certified, at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been in court.

The bankrupt shall, at all times until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court.

If the bankrupt is without the district, and unable to return and personally attend to any of the times, or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do with like effect as if he had not been in default.

He shall also be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property so that the same shall conform to the facts.

For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife.

No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action unless the same is founded on some debt or claim from which his discharge or bankruptcy would not release him.

§ 27. *And be it further enacted,* That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labors performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full;

Provided, That any debt proved by any person liable as bail, surety, guarantor, or otherwise for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given;

And the assignee shall then report and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath;

And he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court;

He shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt, as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands.

At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

In case a dividend is ordered the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim, the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

§ 28. *And be it further enacted,* That the like proceedings shall be had at the expiration of the next three months, or earlier if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted the same shall be divided in manner aforesaid.

Further dividends shall be made in like manner as often as occasion requires;

And after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order.

No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and, if found correct, he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt.

The court shall thereupon order a dividend of the estate and effects, or of

such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts.

In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case, on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars; and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

If, by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:—

First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided,* That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

OF THE BANKRUPT'S DISCHARGE AND ITS EFFECT.

§ 29. *And be it further enacted,* That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proven against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days,* and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

No discharge shall be granted, or, if granted, be valid—

*Amended so as to read "and before the final disposition of the cause."
(Act of July 26, 1876, ch. 234, sec. 1.)

If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact;

Or if he has concealed any part of his estate or effects, or any books or writings relating thereto;

Or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Act;

Or if he has caused, permitted, or suffered any loss, waste, or destruction thereof;

Or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized, on execution;

Or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities;

Or has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors;

Or has removed, or caused to be removed, any part of his property from the district with intent to defraud his creditors;

Or if he has given any fraudulent preference contrary to the provisions of this Act;

Or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property;

Or has lost any part thereof in gaming;

Or has admitted a false or fictitious debt against his estate;

Or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge;

Or if, being a merchant or tradesman, he has not, subsequently to the passage of this Act, kept proper books of account;

Or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation;

Or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts;

Or if he has been convicted of any misdemeanor under this Act, or has been guilty of any fraud whatever contrary to the true intent of this Act;

And before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

§ 30. *And be it further enacted*, That no person who shall have been discharged under this Act, and shall afterwards become bankrupt, on his own application, shall be again entitled to a discharge, whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing

of three-fourths in value of his creditors who have proved their claims, is filed at or before the time of application for discharge.

But a bankrupt, who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

§ 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the Court may in its discretion order any question of fact so presented to be tried at a stated-session of the District Court.

§ 32. *And be it further enacted*, That if it shall appear to the Court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the Court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows:

District Court of the United States, District of —.

Whereas —, has been duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the Court that said — be forever discharged from all debts and claims which by said Act are made provable against his estate, and which existed on the — day of —, on which day the petition for adjudication was filed by or [or against] him excepting such debts, if any, as are by said Act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court at —, in the said district, this — day of —, A. D. —.

[Seal.]

—, Judge.

§ 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt;

And no discharge granted under this Act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise.

And in all proceedings in bankruptcy commenced after one year from the time this Act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, ("upon which he is liable as the principal debtor." So amended, Act of July 27, 1868, ch. 258, sec. 1), unless the assent in writing of a majority in number and value of his creditors who have proved their claims, is filed in the case at or before the time of application for discharge.

(R. S., sec. 5112 a (22 June, 1874, ch. 390, sec. 9, 18 Stat. 180).—That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts or

as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor without the assent of at least one-fourth of his creditors in number, and one-third in value. And the provision in section five thousand one hundred and twelve (thirty-three of said act of March second, eighteen hundred and sixty-seven) requiring fifty per centum of such assets is hereby repealed.)

§ 34. *And be it further enacted*, That a discharge duly granted under this Act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth *in hæc verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge;

Always provided, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same.

Said application shall be in writing; shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court.

The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper.

If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts, and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID.

§ 35. *And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to

believe such person is insolvent* (and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this Act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited).

And if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and† that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this Act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for, or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void;

And if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

(R. S., sec. 5130 a (22 June, 1874, ch. 390, sec. 10, 18 Stat. 180).—That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section five thousand one hundred and twenty-eight (thirty-five) of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act, and in the cases aforesaid, the period of six months mentioned in said section five thousand one hundred and twenty-nine (thirty-five) is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.)

BANKRUPTCY OF PARTNERSHIPS AND OF CORPORATIONS.

§ 36. *And be it further enacted.* That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this Act, upon which all the joint stock and property of the copartnership, and also all the separate estate of

*Amended so as to read: "Knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. And nothing in said section five thousand one hundred and twenty-eight (thirty-five) shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."—Act of June 22, 1874 R. S. § 5128.

†(The word "knowing" inserted by act of June 22, 1874, ch. 390, sec. 11.)

each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted;

And all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts;

And the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof;

And after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors;

And if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors;

And if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy;

And the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts;

And the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this Act;

And in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

§ 37. *And be it further enacted,* That the provisions of this Act shall apply to all moneyed, business, or commercial corporations and joint-stock companies, and that upon the petition of any officer of any such corporation or company duly authorized by a vote of a majority of the corporators present, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors;

And all the provisions of this Act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof.

All payments, conveyances, and assignments declared fraudulent and void by this Act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, or officer, or member thereof;

Provided, That whenever any corporation by proceedings under this Act shall be declared bankrupt, all its property and assets shall be disturbed to the creditors of such corporation in the manner provided in this Act in respect to natural persons.

OF DATES AND DEPOSITIONS.

§ 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register, in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act;

The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection.

Copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated.

Evidence of examination in any of the proceedings under this Act may be taken before the court, or a register in bankruptcy, *viva voce* or in writing, before a commissioner of the Circuit Court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony, in the same manner as in suits in equity in the Circuit Court.

INVOLUNTARY BANKRUPTCY.

§ 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this Act,

Shall depart from the State, district, or territory of which he is an inhabitant, with intent to defraud his creditors;

Or, being absent, shall, with such intent, remain absent;

Or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this Act;

Or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process.

Or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors;

Or who has been arrested and held in custody under or by virtue of mesne process or execution issued out of any court of any State, district or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this Act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days;

Or has been actually imprisoned for more than *(seven) days in a civil action, founded on contract, for the sum of one hundred dollars or upwards.

Or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency shall make any payment, gift, grant, sale, conveyance,† (or transfer of money, or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process), with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties,

*(Amended to "twenty." R. S., sec. 5021; Act of June 22, 1874).

†Amended so as to read, "Or transfer of money or other property, estate rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process."

or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this Act;

*(Or who, being a banker, merchant, or trader, has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days);

Shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors,† (the aggregate of whose debts provable under this Act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.)

‡And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Act: *Provided*, the person receiving such payment or

*Words in parentheses amended so as to read, "or who, being a bank, banker, broker, merchant, trader, (j) manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped, or suspended and not resumed payment, within a period of forty days of his commercial paper, (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days, to pay any depositor upon demand of payment lawfully made. R. S., sec. 5021, Act of June 22, 1874.)

†Words in parentheses amended so as to read, "who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts (1) provable under this act amounts to at least one-third of the debts so provable. R. S., sec. 5021, Act of June 22, 1874.)

‡In the Revised Statutes, section 5021, the following was inserted before and instead of this paragraph: *Provided*, also, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid, according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this Act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith), shall so adjudge, which judgment shall be final, and the matter proceed within further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced, twenty days, and in cases hereafter commenced ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money (m) or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such

conveyance had reasonable cause to believe that a fraud on this Act was intended, or that the debtor was insolvent;

And such creditor shall not be allowed to prove his debt in bankruptcy.

§ 40. *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted;

And may also, by its injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any of the debtor's property not excepted by this Act from the operation thereof, and from any interference therewith;

And if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged bankrupt and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode;

Or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication, in such manner as the judge may direct.

No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication;

*And if such proof be not given on the return day of such order, the pro-

person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid. So amended by act of July 26, 1876, ch. 234, sec. 1, 19 Stat. 102.

*Amended by act of 22 June, 1874, ch. 390, sec. 13, 18 Stat. 182, to read:

"And if, on return day of the order to show cause as aforesaid the court shall be satisfied that the requirement of section five thousand and twenty-one (thirty-nine) of said act, as to the number and amount of petitioning creditors, has been complied with, or if within the time provided for in section five thousand and twenty-one (thirty-nine) of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors, and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

ceedings shall be adjourned and an order made that the notice be forthwith so served or published.

§ 41. *And be it further enacted*, That on such return day, or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demanded in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy;

† (Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district returnable within ten days before him, for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause.)

And if, upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover his costs.

§ 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor.

The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore (See amendment, Act June 22 1874), providing for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order, or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule* of the creditors and an inventory of his estate in the form, and verified in the manner required of a petitioning debtor by section thirteen.

If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause;

And if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

§ 43. *And be it further enacted*, That if, at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such man-

†So amended by act of 22 June, 1874, ch. 390, sec. 14, 18 Stat. 182.

(*Words, "and valuation" added, Act of June 22, 1874.)

ner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled; and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take, and hold, and distribute the estate, under the direction of such committee.

If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed and that the interests of the creditors will be promoted thereby, it shall confirm the same;

And upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees, according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed;

And such consent and the proceedings thereunder shall be as binding in all respects on any creditor, whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it;

And the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors; and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors;

And the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this Act; and the said trustees shall have all the rights and powers of assignees in bankruptcy.

The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers, in the same manner as in other proceedings in bankruptcy under this act;

And the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Act.

If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings;

And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Act.

(R. S., sec. 5103 a (22 June, 1874, ch. 390, sec. 17, 18 Stat. 182).—That in all

cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to the sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or assign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole value of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by a resolution passed in the matter and under the circumstances aforesaid, add to or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interest under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case be computed in calculating periods of time prescribed by said act.)

PENALTIES AGAINST BANKRUPTS.

§ 44. *And be it further enacted*, That from and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy,—

Secrete or conceal any property belonging to his estate;

Or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same, or any part thereof, out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same;

Or make any payment, gift, sale, assignment, transfer, or conveyance or any property belonging to his estate with the like intent;

Or spend any part thereof in gaming;

Or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee, or omit from his schedule, any property or effects whatsoever.

Or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof;

Or shall attempt to account for any of his property by fictitious losses or expenses;

Or shall within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud;

Or shall with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dis-

pose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for;

He shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

§ 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer, of the several courts of bankruptcy, shall, for anything done or pretended to be done under this Act, or under color of doing anything thereunder, willfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such persons, when convicted thereof, shall forfeit any pay the sum of not less than three hundred dollars, and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

§ 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document.

Or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

FEES AND COSTS.

§ 47. *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this Act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the register:

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars..

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this Act, one dollar.

For every day's services while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions, the fees now allowed by law.

For every discharge where there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered the assignee shall pay out of the estate to the messenger the following fees, and no more:

First.—For service of warrant, two dollars.

Second.—For all necessary travel, at the rate of five cents a mile, each way.

Third.—For each written note to creditor named in the schedule, ten cents.

Fourth.—For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they had been actually incurred and paid by him, and are just and reasonable: the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

(R. S., sec. 5127 *a* (22 June, 1874, ch. 390, sec. 18, 18 Stat. 184).—That from and after the passage of this act, the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections four thousand nine hundred and ninety (ten) and five thousand one hundred and twenty-seven (forty-seven) of said act, and no longer, which duties they shall perform as soon as may be.

§ 5127 *b* (22 June, 1874, ch. 390, sec. 19, 18 Stat. 184).—That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First, the number of cases in bankruptcy in which the warrant prescribed in section five thousand and nineteen (eleven) of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year, from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner every register shall, in the same month, and for the same year, make a report to such clerk; of

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupt;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year, in each class of cases above stated.

And in like manner every assignee shall, during said month make like return to such clerk; of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class respectively and separately;

Fifthly, the total amount of all his fees, charges and emoluments of every kind therein, earned or received.

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eightly, a summarized statement of both classes as aforesaid;

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all classes in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such report, their respective names and and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall in said month of August, transmit every such statement and report so filed with him, together with his own statement and report as aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.)

OF MEANING OF TERMS AND COMPUTATION OF TIME.

§ 48. *And be it further enacted*, That the word "assignee" and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer.

The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation."

And in all cases in which any particular number of days is prescribed by this Act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under this Act, for the doing of any Act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

§ 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia.

And in and upon the Supreme Courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories.

And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a Circuit Court in bankruptcy may be exercised by the district judge.

§ 50. *And be it further enacted*, That this act shall commence and take effect, as to the appointment of the officers created hereby and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini eighteen hundred and sixty-seven.

THE BANKRUPTCY ACT OF 1841.

An Act to establish a uniform System of Bankruptcy throughout the United States.

(Passed August 19th, 1841, repealed March 3rd, 1843.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That there be, and hereby is, established throughout the United States a uniform system of bankruptcy, as follows: All persons whatsoever, residing in any State, District or Territory of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, and shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court. All persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole or not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, District or Territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested, or shall willingly and fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidence of debt: Provided, however, That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence, in such manner and under such directions as the court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

SEC. 2. And be it further enacted, that all future payments, securities, conveyances, or transfers of property, or agreement made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any cred-

itor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive, the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act; Provided, That all dealings and transactions by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or effected by this act: Provided, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same he assented to by a majority in interest of those of his creditors who have not been so preferred: And provided also, That nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or any liens, mortgages, or other securities, on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

Sec. 3. And be it further enacted; That all the property, and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested, by force of the same decree, for this purpose, which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office: Provided, however, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the

determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

SEC. 4. And be it further enacted, That every bankrupt who shall bona-fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: Provided, That in all cases where the residence of the creditor is known, a service of him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor, underwriter, broker, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account, after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: Provided, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety, or otherwise for or with the bankrupt. And such bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if, in any such examination, he shall wilfully and corruptly answer, or swear, or affirm, falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if,

in any case of bankruptcy, a majority in number and value of the creditors who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge, as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision at any time within ten days thereafter to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

SEC. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona-fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in present; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that

purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives.

SEC. 6. And be it further enacted, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed upon the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditors or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignees and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court in each district, from time to time to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules, regulations and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms substituted therefore; and in all such rules, regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

SEC. 7. And be it further enacted, That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where such hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by such court, or before any disinterested State judge of the State in which the deposition is taken;

and all proof of debts or other claims, by creditors entitled to prove the same under this act shall be under oath or solemn affirmations, as aforesaid, before such court or commissioner appointed thereby, or before some disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as the creditor shall have a right to a trial by jury upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he and they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

SEC. 8. And be it further enacted, That the circuit court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person or persons claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

SEC. 9. And be it further enacted, That all sales, transfers and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest.

SEC. 10. And be it further enacted, That in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the

order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and in all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

SEC. 11. And be it further enacted, That the assignee shall have full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable in presenti or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims, or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

SEC. 12. And be it further enacted, That if any person who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

SEC. 13. And be it further enacted, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept and numbered in the office of the said court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents, and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but he may be allowed, in addition, his actual travel expenses for that purpose.

SEC. 14. And be it further enacted, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate

creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

SEC. 15. And be it further enacted, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt, of, in and to, the lands therein mentioned and described, to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order.

SEC. 16. And be it further enacted, That all jurisdiction, power and authority, conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases in bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

SEC. 17. And be it further enacted, That this act shall take effect from and after the first day of February next.

THE BANKRUPTCY ACT OF 1800.

An Act to establish a uniform System of Bankruptcy throughout the United States.

(Passed April 4th, 1800; repealed December 19th, 1803.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of June next, if any merchant or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the State in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands, or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge or bail, shall remain in prison two months or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to, any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she shall be arrested, at or before the return-day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable every such person shall be deemed and adjudged a bankrupt: Provided, that no person shall be liable to a commission of bankruptcy if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed.

SEC. 2. And be it further enacted, That the judge of the district court of the United States, for the district where the debtor resides, or usually resided at the time of committing the act of bankruptcy, upon petition in writing against such person or persons being bankrupt, to him to be exhibited by any one creditor; or by a greater number, being partners, whose single debt shall amount to one thousand dollars, or by two creditors whose debts shall amount to one thousand, five hundred dollars, or by more than two creditors whose debts shall amount to two thousand dollars, shall have power, by commission under his hand and seal, to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall deem proper, not exceeding three, to be commissioners of the said bankrupt, and in case of vacancy or refusal to act, to appoint others from time to time as occasion may require: Provided always, that before any commission shall issue, the creditor or creditors petitioning shall make affidavit or solemn affirmation before the said judge of the truth of his, her or their debts, and give

bond, to be taken by the said judge, in the name and for the benefit of the said party so charged as a bankrupt, and in such penalty, and with such surety, as he shall require, to be conditioned for the proving of his, her or their debts, as well before the commissioners as upon a trial at law, in case the due issuing forth of the said commission shall be contested, and also for proving the party a bankrupt, and to proceed on such commission in the manner herein prescribed. And if such debt shall not be really due, or after such commission taken out it cannot be proved that the party was a bankrupt, then the said judge shall upon the petition of the party aggrieved, in case there be occasion, deliver such bond to the said party, who may sue thereon, and recover such damages under the penalty of the same, as, upon trial at law, he shall make appear he has sustained, by reason of any breach of the condition thereof.

SEC. 3. And be it further enacted, That before the commissioners shall be capable of acting, they shall respectively take and subscribe the following oath or affirmation, which shall be administered by the judge issuing the commission, or by any of the judges of the Supreme Court of the United States, or any judge, justice or chancellor of any State court, and filed in the office of the clerk of the district court: "I, A. B., do swear, or affirm, that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner, in a commission of bankruptcy against _____, and that without favor or affection, prejudice or malice." And the commissioners, who shall be sworn, as aforesaid, shall proceed, as soon as may be, to execute the same; and upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt: Provided, that before such examination be had, reasonable notice thereof, in writing, shall be delivered to the person charged as a bankrupt; or if he or she be not found at his or her usual place of abode, to some person of the family above the age of twelve years, or if no such person appear, shall be fixed at the front or other public door of the house in which he or she usually resides, and thereupon it shall be in the power of such person, so charged as aforesaid, to demand before, or at the time appointed for such examination, that a jury be empanelled to inquire into the fact or facts alleged as the causes for issuing the commission, and on such demand being made the inquiry shall be had before the judge granting the commission, at such time as he may direct, and in that case such person shall not be declared bankrupt, unless, by the verdict of the jury, he or she shall be found to be within the description of this act, and shall be convicted of some one of the acts described in the first section of this act: Provided also, that any commission which shall be taken out as aforesaid, and which shall not be proceeded in as aforesaid, within thirty days thereafter, may be superseded by the said judge who shall have granted the same, upon the application of the party thereby charged as a bankrupt, or of any creditor of such person, unless the delay shall have been unavoidable or upon a just occasion.

SEC. 4. And be it further enacted, That the commissioners so to be appointed shall have power forthwith, after they have declared such person a bankrupt, to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, wheresoever to be found within the United States: Provided, they shall think that there is reason to apprehend that the said bankrupt intends to abscond or conceal him or herself, and in case it be necessary in order to take the body of said bankrupt, shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found.

SEC. 5. And be it further enacted, That it shall be the duty of the commissioners so to be appointed, forthwith, after they have declared such person a bankrupt, and they shall have power to take into their possession all the estate, real and personal, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted) and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed, in manner hereafter provided.

SEC. 6. And be it further enacted, That the said commissioners shall forthwith, after they have declared such person a bankrupt, cause due and sufficient public notice thereof to be given, and in such notice shall appoint some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts; and where any creditor shall reside at a distance from the place of such meeting, shall allow the debt of such creditor to be proved by oath or affirmation, made before some competent authority, and duly certified, and shall permit any person duly authorized by letter of attorney from such creditor, due proof of the execution of such letter of attorney being first made, to vote in the choice of an assignee or assignees of such bankrupt's estate and effects in the place and stead of such creditor: and the said commissioners shall assign, transfer or deliver over, all and singular, the said bankrupt's estate and effects, aforesaid, with all muniments and evidences thereof, to such person or persons as the major part in value of such creditors, according to the several debts then proved, shall choose as aforesaid: Provided always, That in such choice, no vote shall be given by, or in behalf of, any creditor whose debt shall not amount to two hundred dollars.

SEC. 7. Provided always, and be it further enacted, That it shall be lawful for the said commissioners, as often as they shall see cause, for the better preserving and securing of the bankrupt's estate, before assignees shall be chosen as aforesaid, immediately to appoint one or more assignee or assignees of the estate and effects aforesaid, or any part thereof; which assignee or assignees aforesaid, or any of them, may be removed at the meeting of the creditors, so to be appointed as aforesaid for the choice of assignees, is such creditors, entitled to vote as aforesaid, or the major part in value of them, shall think fit; and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt which shall have come to his or their hands or possession, unto such other assignee or assignees as shall be chosen by the creditors as aforesaid; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such first assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over as aforesaid, all the estate and effects as aforesaid, every such assignee or assignees shall, respectively, forfeit a sum not exceeding five thousand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

SEC. 8. And be it further enacted, That at any time previous to the closing of the accounts of the said assignee or assignees so chosen as aforesaid, it

shall be lawful for such creditors of the bankrupt as are hereby authorized to vote in the choice of assignees, or the major part of them in value, at a regular meeting of the said creditors, to be called for that purpose by the said commissioners, or by one-fourth in value of such creditors, to remove all or any of the assignees chosen as aforesaid, and to choose one or more in his or their place and stead, and such assignee or assignees as shall be so removed shall deliver up all the estate and effects of such bankrupt which shall have come into his or their hands or possession, unto such new assignee or assignees as shall be chosen by the creditors at such meeting; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such former assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing from such new assignee or assignees of their appointment, as aforesaid, to deliver over, as aforesaid, all the estate and effects aforesaid, every such former assignee or assignees shall respectively forfeit a sum not exceeding five thousand dollars for the use of the creditors, and moreover shall be liable for the property so detained.

SEC. 9. And be it further enacted, That whenever a new assignee or assignees shall be chosen as aforesaid, no suit at law or in equity shall be thereby abated; but it shall and may be lawful for the court in which any suit may depend, upon the suggestion of the removal of a former assignee or assignees, and of the appointment of a new assignee or assignees, to allow the name of such new assignee or assignees, to be substituted in place of the name or names of the former assignee or assignees, and thereupon the suit shall be prosecuted in the name or names of the new assignee or assignees, in the same manner as if he or they had originally commenced the suit in his or their own names.

SEC. 10. And be it further enacted, That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity against the bankrupt, and all persons claiming by, from or under such bankrupt, by any act done at the time, or after, he shall have committed the act of bankruptcy upon which the commission issued: Provided always, that in case of a bona-fide purchase made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached.

SEC. 11. And be it further enacted, That the said commissioners shall have power, by deed or deeds, under their hands and seals, to assign and convey to the assignee or assignees to be appointed or chosen as aforesaid, any lands, tenements or hereditaments which such bankrupt shall be seized of or entitled to, in fee tail, at law, or in equity, in possession, remainder or reversion, for the benefit of the creditors; and all such deeds being duly executed and recorded, according to the laws of the State within which such lands, tenements or hereditaments may be situated, shall be good and effectual against all persons whom the said bankrupt, by common recovery, or other means, might or could bar of any estate, right, title of or in the said lands, tenements or hereditaments.

SEC. 12. And be it further enacted, That if any bankrupt shall have conveyed or assured any lands, goods or estate, unto any person, upon condition or power of redemption, by payment of money or otherwise, it shall be lawful for the commissioners, or for any person by them duly authorized for that purpose, by writing, under their hands and seals, to make tender of money or

other performance according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners, after such performance or tender, shall have power to assign such lands, goods and estate for the benefit of the creditors, as fully and effectually as any other part of the estate of such bankrupt.

SEC. 13. And be it further enacted, That the commissioners aforesaid shall have power to assign, for the use aforesaid, all the debts due to such bankrupt, or to any other person for his or her use or benefit; which assignment shall vest the property and right thereof in the assignee or assignees of such bankrupt, as fully as if the bond, judgment, contract or claim had originally belonged or been made to the said assignees; and after the said assignment, neither the said bankrupt nor any person acting as trustee for him or her, shall have power to recover or discharge the same, nor shall the same be attached as the debt of the said bankrupt; but the assignee or assignees aforesaid shall have such remedy to recover the same, in his or their own name or names, as such bankrupt might or could have had if no commission of bankruptcy had issued. And when any action in the name of such bankrupt shall have been commenced, and shall be pending for the recovery of any debt or effects of such bankrupt, which shall be assigned, or shall or might become vested in the assignee or assignees of such bankrupt as aforesaid, then such assignee or assignees may claim to be, and shall be thereupon, admitted to prosecute such action in his or their name, for the use and benefit of the creditors of such bankrupt; and the same judgment shall be rendered in such action, and all attachments and other security taken therein shall be in like manner holden and liable, as if the said action had been originally commenced in the name of said assignee or assignees, after the original plaintiff therein had become a bankrupt as aforesaid: Provided, that where a debtor shall have, bona-fide, paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees.

SEC. 14. And be it further enacted, That if complaint shall be made or information given to the commissioners, or if they shall have good reason to believe or suspect, that any of the property, goods, chattels, or debts, of the bankrupt are in the possession of any other person, or that any person is indebted to or for the use of the bankrupt, then the said commissioners shall have power to summon, or to cause to be summoned, by their attorney or other person duly authorized by them, all such persons before them, or the judge of the district where such person shall reside, by such process, or other means, as they shall think convenient, and upon their appearance to examine them by parole or by interrogatories, in writing, on oath or affirmation, which oath or affirmation they are hereby empowered to administer, respecting the knowledge of all such property, goods, chattels and debts; and if such person shall refuse to be sworn or affirmed, and to make answer to such questions or interrogatories as shall be administered, and to subscribe the said answers, or upon examination shall not declare the whole truth, touching the subject-matter of such examination, then it shall be lawful for the commissioners or judge to commit such person to prison, there to be detained until they shall submit themselves to be examined in manner aforesaid, and they shall, moreover, forfeit double the value of all the property, goods, chattels and debts by them concealed.

SEC. 15. And be it further enacted, That if any of the aforesaid persons shall, after legal summons to appear before the commissioners or judge, to be examined, refuse to attend, or shall not attend at the time appointed, having no such impediment as shall be allowed of by the commissioners or judge it shall be lawful for the said commissioners or judge to direct their warrants to

such person or persons as by them shall be thought proper, to apprehend such persons as shall refuse to appear, and to bring them before the commissioners or judge to be examined, and upon their refusal to come, to commit them to prison, until they shall submit themselves to be examined according to the directions of this act: Provided, that such witnesses as shall be so sent for shall be allowed such compensation as the commissioners or judge shall think fit, to be ratably borne by the creditors; and if any person, other than the bankrupt, either by subornation of others, or by his or her own act, shall wilfully or corruptly commit perjury, shall on conviction thereof be fined not exceeding four thousand dollars and imprisoned not exceeding two years, and moreover shall, in either case, be rendered incapable of being a witness in any court of record.

SEC. 16. And be it further enacted, That if any person or persons shall fraudulently or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors.

SEC. 17. And be it further enacted, That if any person, prior to his or her becoming a bankrupt, shall convey to any of his or her children, or other persons, any lands or goods, or transfer his or her debts or demands into other persons' names, with intent to defraud his or her creditors, the commissioners shall have power to assign the same in as effectual a manner as if the bankrupt had been actually seized or possessed thereof.

SEC. 18. And be it further enacted, That if any person or persons who shall become bankrupt within the intent and meaning of this act, and against whom a commission of bankruptcy shall be duly issued, upon which commission such person or persons shall be declared bankrupt, shall not, within forty-two days after notice thereof, in writing, to be left at the usual place of abode of such person or persons, or personal notice in case such person or persons be then in prison, and notice given in some gazette, that such commission hath been issued, and of the time and place of meeting of the commissioners, surrender him or herself to the said commissioners, and sign or subscribe such surrender, and submit to be examined, from time to time, upon oath or solemn affirmation, by and before such commissioners, and in all things conform to the provisions of this act, and also upon such his or her examination fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, monies or other effects and estate, and of all books, papers and writings relating thereunto of which he or she was possessed, or in or to which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission, or whereby such bankrupt, or his or her family then hath or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, except only such part of his or her estate and effects as shall have been really and bona-fide before sold and disposed of in the way of his or her trade and dealings, and except such sums of money as shall have been laid out in the ordinary expensés of his or her family, and also upon such examination, execute in due form of law such conveyance, assurance and assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators and assigns forever, in trust, for the use of all and every the creditors of such bankrupt, who shall come in and

prove their debts under the commission; and deliver up unto the commissioners all such part of his or her, the said bankrupt's goods, wares, merchandise, money, effects and estate, and all books, papers and writing thereunto relating, as at the time of such examination shall be in his or her possession, custody or power, his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted, then he or she the said bankrupt, upon the conviction of any wilful default or omission in any of the matters or things aforesaid, shall be adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not at any time after be entitled to the benefits of this act: Provided always, that in case any bankrupt shall be in prison or custody at the time of issuing such commission, and is willing to surrender and submit to be examined according to the directions of this act, and can be brought before the said commissioners and creditors for that purpose, the expense thereof shall be paid out of the said bankrupt's effects, and in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the said commissioners, or some one of them, shall from time to time attend the said bankrupt in prison or custody, and take his or her discovery as in other cases, and the assignees or one of them, or some person appointed by them, shall attend such bankrupt in prison or custody, and produce his or her books, papers and writings, in order to enable him or her to prepare his or her discovery; a copy whereof the said assignees shall apply for, and the said bankrupt shall deliver to them or their order within a reasonable time after the same shall have been required.

SEC. 19. And be it further enacted, That the said commissioners shall appoint, within the said forty-two days, so limited as aforesaid, for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the third of which meetings shall be on the last of the said forty-two days: Provided always, that the judge of the district within which such commission issues shall have power to enlarge the time so limited as aforesaid, for the purposes aforesaid, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made at least six days before the expiration of said term.

SEC. 20. And be it further enacted, That it shall be lawful for the commissioners, or any other person or officers by them to be appointed, by their warrant, under their hands and seals, to break open in the day time the houses, chambers, shops, warehouses, doors, trunks or chests, of the bankrupt, where any of his or her goods or estate, deeds, books of account or writings, shall be, and to take possession of the goods, money and other estate, deeds, books of account or writings of such bankrupt.

SEC. 21. And be it further enacted, That if the bankrupt shall refuse to be examined, or to answer fully, or to subscribe his or her examination as aforesaid it shall be lawful for the commissioners to commit the offender to close imprisonment until he or she shall conform him or herself; and if the said bankrupt shall submit to be examined, and upon his or her examination it shall appear that he or she hath committed wilful or corrupt perjury, he or she may be indicted therefor, and being thereof convicted shall suffer imprisonment for a term not less than two years, nor exceeding ten years.

SEC. 22. And be it further enacted, That every bankrupt having surrendered, shall, at all seasonable times before the expiration of the said forty-two days, as aforesaid, or of such further time as shall be allowed to finish his or her examination, be at liberty to inspect his or her books and writings, in the

presence of some person to be appointed by the commissioners, and to bring with him or her, for his or her assistance, such persons as he or she shall think fit, not exceeding two at one time, and to make extracts and copies to enable him or her to make a full discovery of his or her effects; and the said bankrupt shall be free from arrests, in coming to surrender, and after having surrendered to the said commissioners for the said forty-two days, or such farther time as shall be allowed for the finishing his or her examination; and in case such bankrupt shall be arrested for debt, or taken on any escape warrant or execution, coming to surrender, or after his or her surrender within the time before mentioned, then on producing such summons or notice under the hands of the commissioners, and giving the officer a copy thereof, he or she shall be discharged; and in case any officer shall afterwards detain such bankrupt, such officer shall forfeit to such bankrupt, for his or her own use, ten dollars for every day he shall detain the bankrupt.

SEC. 23. And be it further enacted, That every person who shall knowingly or wilfully receive or keep concealed any bankrupt so as aforesaid summoned to appear, or who shall assist such bankrupt in concealing him or herself, or in absconding, shall suffer such imprisonment, not exceeding twelve months, or pay such fine to the United States, not exceeding one thousand dollars, as upon conviction thereof shall be adjudged.

SEC. 24. And be it further enacted, That the said commissioners shall have power to examine, upon oath or affirmation, the wife of any person lawfully declared a bankrupt, for the discovery of such part of his estate as may be concealed or disposed of by such wife, or by any other person; and the wife shall incur such penalties for not appearing before the said commissioners, or refusing to be sworn or affirmed or examined, and to subscribe her examination, or for not disclosing the truth, as by this act is provided against any other person in like cases.

SEC. 25. And be it further enacted, That in case any person shall be committed by the commissioners for refusing to answer, or for not fully answering any question, or for any other cause, the commissioners shall in their warrant specify such question or other cause of commitment.

SEC. 26. And be it further enacted, That if after the bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate, before unknown to the commissioners, such person or persons shall be entitled to five per cent. out of the effects so discovered, and such further reward as the commissioners shall think proper; and any trustee having notice of the bankruptcy, wilfully concealing the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of the creditors.

SEC. 27. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof such commission may and shall be superseded, and it shall and may be lawful for either of the judges having authority to grant the commission as aforesaid, to award any creditor petitioning another commission, and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back or deliver up the same, or the full value thereof, to the assignee or assignees

who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among, the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 28. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security, for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof, such commission shall and may be superseded, and it shall and may be lawful for either of the judges, having authority to grant the commission as aforesaid, to award any creditor petitioning another commission; and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission in manner aforesaid, in trust for, and to be divided amongst the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 29. And further be it enacted, That every person who shall be chosen assignee of the estate and effects of a bankrupt shall, at some time after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least thirty days public notice to be given of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of the bankrupt's estate and effects; at which time the creditors who have not before proved their debts shall be at liberty to prove the same; and upon every such meeting the assignee or assignees shall produce to the commissioners and creditors then present fair and just accounts of all his or their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof, and shall, if the creditors then present, or a major part of them, require the same, be examined upon oath or solemn affirmation before the same commissioners, touching the truth of such accounts; and in such accounts the said assignee or assignees shall be allowed and retain all such sum and sums of money as they shall have paid or expended in suing out and prosecuting the commission, and all other just allowances on account of or by reason or means of their being assignee or assignees; and the said commissioners shall order such part of the net product of the said bankrupt's estate as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they shall think fit, to be forthwith divided among such of the bankrupt's creditors as have duly proved their debts under such commission, in proportion to their several and respective debts; and the commissioners shall make such their order for a dividend in writing, under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver to each of the assignees under such commission a duplicate of such their order, which order of distribution shall contain an account of the time and place of making such order, and the sum total or quantum of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how many per cent. in particular is there ordered to be paid to every creditor of his debt; and the said assignee or assignees, in pursuance of such order, and without any deed or deeds of distribution to be made for the purpose, shall forthwith make such dividend and distribution accordingly, and shall take receipts in a book to be kept for the purpose, from each creditor, for the part or share of

such dividend or distribution which he or they shall make and pay to each creditor respectively; and such order and receipt shall be a full and effectual discharge to such assignee for so much as he shall fairly pay, pursuant to such order as aforesaid.

SEC. 20. And it be further enacted, That within eighteen months next after the issuing of the commission the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same were not wholly divided upon the first dividend, and shall cause due public notice to be given of the time and place the said commissioners intend to meet to make a second distribution of the bankrupt's estate and effects, and for the creditors who shall not before have proved their debts to come in and prove the same; and at said meeting the said assignees shall produce, on oath or solemn affirmation as aforesaid, their account of the bankrupt's estate and effects, and what upon the balance thereof shall appear to be in their hands shall, by like order of the commissioners, be forthwith divided amongst such of the bankrupt's creditors as shall have made due proof of their debts, in proportion to their several and respective debts, which second dividend shall be final, unless any suit at law or in equity be pending, or any part of the estate standing out that could not have been disposed of, or that the major part of the creditors shall not have agreed to be sold or disposed of, or unless some other or future estate or effect of the bankrupt shall afterwards come to or vest in the said assignees, in which cases the said assignees shall as soon as may be, convert such future or other estate and effects into money, and shall within two months after the same be converted into money, by like order of the commissioners, divide the same among such bankrupt's creditors as shall have made due proof of their debt under such commission.

SEC. 31. And be it further enacted, That in the distribution of the bankrupt's effects there shall be paid to every one of the creditors a portion-rate according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (Provided, there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt.

SEC. 32. And be it further enacted, That the assignees shall keep one or more distinct book or books of account, wherein he or they shall duly enter all sums of money or effects which he or they shall have received or got into his or their possession, of the said bankrupt's estate, to which books of account every creditor who shall have proved his or her debt shall, at all reasonable times, have free resort and inspect the same as often as he or she shall think fit.

SEC. 33. And be it further enacted. That every bankrupt, not being in prison or custody, shall at all times after his surrender be bound to attend the assignees upon every reasonable notice, in writing, for that purpose, given or left at the usual place of his or her abode, in order to assist in making out the accounts of the said bankrupt's estate and effects, and to attend any court of record, to be examined touching the same, or such other business as the said assignee shall judge necessary, for which he shall receive three dollars per day.

SEC. 34. And be it further enacted, That all and every person and persons who shall become bankrupt as aforesaid, and who shall within the time limited by this act surrender him or herself to the commissioners, and in all things

conform as in and by this act is directed, shall be allowed five per cent. upon the net produce of all the estate that shall be recovered in and received, which shall be paid unto him or her by the assignee or assignees, in case the net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, creditors of said bankrupt who shall have proved their debts under such commission the amount of fifty per cent. on their said debts, respectively, and so as the said five per cent. shall not exceed, in the whole, the sum of five hundred dollars; and in case the net produce of the said estate shall, over and above the allowance hereafter mentioned, be sufficient to pay the said creditors seventy-five per cent. on the amount of their said debts, respectively, that then the said bankrupt shall be allowed ten per cent. on the amount of such net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, exceed the sum of eight hundred dollars; and every such bankrupt shall be discharged from all debts by him or her due or owing at the time he or she became bankrupt, and all which were or might have been proved under the said commission; and in case any such bankrupt shall afterwards be arrested or prosecuted or impleaded, for or on account of any of the said debts, such bankrupt may appear without bail, and may plead the general issue, and give this act and the special matter in evidence. And the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be, sufficient evidence, prima facie of the party's being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless he can make appear any concealment of estate or effects by such bankrupt to the value of one hundred dollars. Provided, That no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid.

SEC. 35. Provided always, and be it further enacted, That if the net proceeds of the bankrupt's estate, so to be discovered, recovered and received, shall not amount to so much as will pay all and every of the creditors of the said bankrupt who shall have proved their debts under the said commission, the amount of fifty per cent. on their debts respectively, after all charges first deducted, that then and in such case the bankrupt shall not be allowed five per centum on such estate as shall be recovered in, but shall have and be paid by the assignees so much money as the commissioners shall think fit to allow, not more than three hundred dollars, nor exceeding three per centum on the net proceeds of the said bankrupt's estate.

SEC. 36. Provided also, and be it further enacted, That no person becoming a bankrupt according to the intent and provisions of this act shall be entitled to a certificate of discharge, or to any of the benefits of the act, unless the commissioners shall certify under their hands to the judge of the district within which such commission issues that such bankrupt hath made a full discovery of his or her estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects; or

unless the said judge should be of opinion that the said certificate was unreasonably denied by the commissioners; and unless two-thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts under the said commission, shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge in pursuance of this act; which signing and consent shall be also certified by the commissioners; but the said commissioners shall not certify the same till they have proof by affidavit or affirmation, in writing, of such creditors, or of the persons respectively authorized for that purpose signing the said certificate; which affidavit or affirmation, together with the letter or power of attorney to sign, shall be laid before the judge of the district within which such commission issues, in order for the allowing the certificate of discharge, and the said certificate shall not be allowed unless the bankrupt make oath or affirmation in writing that the certificate of the commissioners and consent of the creditors thereunto were obtained fairly and without fraud; and any of the creditors of the said bankrupt are allowed to be heard, if they shall think fit before the respective persons aforesaid, against the making or allowing of such certificates by the commissioners or judge.

SEC. 37. And be it further enacted, That if any creditor, or pretended creditor, of any bankrupt shall exhibit to the commissioners any fictitious or false debt or demand, with intent to defraud the real creditors of such bankrupt, and the bankrupt shall refuse to make discovery thereof and suffer the fair creditors to be imposed upon, he shall lose all title to the allowance upon the amount of his effects and to a certificate of discharge as aforesaid, nor shall he be entitled to the said allowance or certificate if he has lost at any one time fifty dollars, or in the whole three hundred dollars, after the passing of this act and within twelve months before he became a bankrupt, by any manner of gaming or wagering whatever.

SEC. 38. And be it further enacted, That if any bankrupt who shall have obtained his certificate shall be taken in execution or detained in prison on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody to discharge such bankrupt without fee or charge, first giving reasonable notice to the plaintiff, or his attorney, of the motion for such discharge.

SEC. 39. And be it further enacted, That every person who shall have bonafide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable

before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning.

SEC. 40. And be it further enacted, That in case any person committed by the commissioners' warrant shall obtain a habeas corpus, in order to be discharged and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court or judge before whom such party shall be brought by habeas corpus, by rule or warrant, to commit such persons to the same prison, there to remain until he shall conform as aforesaid, unless it shall be made to appear that he had fully answered all lawful questions put to him by the commissioners; or in case such person was committed for not signing his examination, unless it shall appear that the party had good reason for refusing to sign the same or that the commissioners had exceeded their authority in making such commitment; and in case the gaoler to whom such person shall be committed shall willfully or negligently suffer such person to escape, or go without the doors or walls of the prison, such gaoler shall for such offense, being convicted thereof, forfeit a sum not exceeding three thousand dollars, for the use of the creditors.

SEC. 41. And be it further enacted, That the gaoler shall, upon the request of any creditor having proved his debt and showing a certificate thereof under the hands of the commissioners, which the commissioners shall give without fee or reward, produce the person so committed; and in case such gaoler shall refuse to show such person to such creditor requesting the same, such person shall be considered as having escaped, and the gaoler or sheriff so refusing shall be liable as for a willful escape.

SEC. 42. And be it further enacted, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set off, and no more, shall be claimed or paid on either side respectively.

SEC. 43. And be it further enacted, That it shall and may be lawful to and for the assignee or assignees of any bankrupt's estate and effects, under the direction of the commissioners, and by and with the consent of the major part in value of such of the said bankrupt's creditors as shall have duly proved their debts under the commission, and shall be present at any meeting of the said creditors, to be held in pursuance of due and public notice for that purpose given, to submit any difference or dispute for, on account of, or by reason or means of, any matter, cause, or thing whatsoever, relating to such bankrupt, or to his or her estate or effects, to the final end and determination of arbitrators to be chosen by the said commissioners, and the major part in value of such creditors as shall be present at such meeting as aforesaid, in such manner as the said assignee or assignees, under the direction and with the consent aforesaid, shall think fit and can agree; and the same shall be binding on the several creditors of the said bankrupt, and the said assignee or assignees are hereby indemnified for what they shall fairly do, according to the directions aforesaid.

SEC. 44. And be it further enacted, That the assignees shall be, and hereby are, vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue, without being subject to any tax, duty, imposition, or restriction, any law to the contrary notwithstanding.

SEC. 45. And be it further enacted, That if after any commission of bankruptcy sued forth, the bankrupt happen to die before the commissioners shall

have distributed the effects, or any part thereof, the commissioners shall nevertheless proceed to execute the commission as fully as they might have done if the party were living.

SEC. 46. And be it further enacted, That where any commission of bankruptcy shall be delivered to the commissioners therein named, to be executed, it shall and may be lawful for them before they take the oath or affirmation of qualification, to demand and take from the creditor or creditors prosecuting such commission a bond with one good security, if required, in the penalty of one thousand dollars, conditioned for the payment of the costs, charges and expenses which shall arise and accrue upon the prosecution of the said commission: Provided always, that the expenses so as aforesaid to be secured and paid by the petitioning creditor or creditors shall be repaid to him or them by the commissioner or assignees out of the first monies arising from the bankrupt's estate or effects, if so much be received therefrom.

SEC. 47. And be it further enacted, That the district judges in each district respectively shall fix a rate of allowance to be made to the commissioners of bankruptcy, as compensation of services to be rendered under the commission, and it shall be lawful for any creditor, by petition to the district judge, to except to any charge contained in the account of the commissioners: and the said judge, after hearing the commissioners, may in a summary way decide upon the validity of such exception.

SEC. 48. And be it further enacted, That all penalties given by this act for the benefit of the creditors shall be recovered by the assignee or assignees by action of debt, and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

SEC. 49. And be it further enacted, That if any action shall be brought against any commissioner, or assignee or other person, having authority under the commission, for anything done and performed by force of this act, the defendant may plead the general issue, and give this act and the special matter in evidence; and in case of a non-suit, discontinuance, or verdict or judgment for him, he shall recover double costs.

SEC. 50. And be it further enacted, That if any estate, real or personal, shall descend, revert to, or become vested in any person after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate signed by the judge as aforesaid, all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignee or assignees in fee simple or otherwise, in like manner as above directed, with the estate of the said bankrupt, at the time of the bankruptcy, and the proceeds thereof shall be divided among the creditors.

SEC. 51. And be it further enacted, That the said commissioners shall, once in every year, carefully file in the clerk's office of the district court all the proceedings had in every case before them, and which shall have been finished, including the commissions, examinations, dividends, entries and other determinations of the said commissioners, in which office the final certificate of the said bankrupt may also be recorded; all which proceedings shall remain of record in the said office, and certified copies thereof shall be admitted as evidence in all courts, in like manner as the copies of the proceedings of the said district court are admitted in other cases.

SEC. 52. And be it further enacted, That it shall and may be lawful for any creditor of such bankrupt to attend all or any of the examinations of said bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine

witnesses and documents before such judge or commissioners, relative to the subject-matter before them. And in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact in the commencement or progress of the said proceedings, or in the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts and the determination thereon, with the complaint of the party, and a prayer for trial by jury to determine the same, and the said judge shall, in his discretion, make order thereon, and reward a venire facias to the marshal of the district, returnable within fifteen days before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the trial shall be had, unless, on good cause shown, the judge shall give farther time, and judgment being entered on the verdict of the jury shall be final on the said facts, and the judge or commissioners shall proceed agreeably thereto.

SEC. 53. And be it further enacted, That the commissioners before the appointment of assignees, and the assignees after such appointment, may from time to time make such allowance out of the bankrupt's estate until he shall have obtained his final discharge as in their opinion may be requisite for the necessary support of the said bankrupt and his family.

SEC. 54. And be it further enacted, That it shall be lawful for the major part in value of the creditors, before they proceed to the choice of assignees, to direct in what manner, with whom and where the monies arising by and to be received from time to time out of the bankrupt's estate shall be lodged, until the same shall be divided among the creditors, as herein provided; to which direction every such assignee and assignees shall conform as often as three hundred dollars shall be received.

SEC. 55. And be it further enacted, That every matter and thing by this act required to be done by the commissioners of any bankrupt shall be valid to all intents and purposes, if performed by a majority of them.

SEC. 56. And be it further enacted, That in all cases where the assignee shall prosecute any debtor of the bankrupt for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be conclusive evidence of the issuing the commission, and of the person named therein being a trader and bankrupt at the time mentioned therein.

SEC. 57. And be it further enacted, That every person obtaining a discharge from his debts, by certificate as aforesaid, granted under a commission of bankruptcy, shall not on any future commission be entitled to any other certificate than a discharge of his person only; unless the net proceeds of the estate and effects of such person so becoming bankrupt a second time shall be sufficient to pay seventy-five per cent. to his or her creditors on the amount of their debts respectively.

SEC. 58. And be it further enacted, That any creditor of a person against whom a commission of bankruptcy shall have been sued forth, and who shall lay his claim before the commissioners appointed in pursuance of this act, may at the same time declare his unwillingness to submit the same to the judgment of the said commissioners, and his wish that a jury may be impanelled to decide thereon: And in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the

commissioners, and require that the same should be referred to a jury. In either case such objection and request shall be entered on the books of the commissioners, and thereupon an issue shall be made up between the parties, and a jury shall be impanelled, as in other cases, to try the same in the circuit court for the district in which such bankrupt has usually resided. The verdict of such jury shall be subject to the control of the court, as in suits originally instituted in the said court, and when rendered, if not set aside by the said court, shall be certified to the commissioners, and shall ascertain the amount of any such claim, and such creditor or creditors shall be considered in all respects as having proved their debts under the commission.

SEC. 59. And be it further enacted, That the lands and effects of any person becoming bankrupt may be sold on such credit, and on such security, as a major part in value of the creditors may direct: Provided, nothing herein contained shall be allowed so to operate as to retard the granting the bankrupt's certificate.

SEC. 60. And be it further enacted, That if any person becoming bankrupt shall be in prison, it shall be lawful for any creditor or creditors, at whose suit he or she shall be in execution, to discharge him or her from custody, or if such creditor or creditors shall refuse to do so, the prisoner may petition the commissioners to liberate him or her, and thereupon, if in the opinion of the commissioners the conduct of such bankrupt shall have been fair, so as to entitle him or her in their opinion to a certificate, when by law such certificate might be given, it shall be lawful for them to direct the discharge of such prisoner, and to enter the same in their books, which being notified to the keeper of the gaol in which such prisoner may be confined shall be a sufficient authority for his or her discharge: Provided, that in either case, such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt: And provided also, that it shall be no bar to a subsequent imprisonment of such bankrupt by order of the commissioners, in conformity with the provisions of this act.

SEC. 61. And be it further enacted, That this act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons who are or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums herein mentioned. And if any person within the purview of this act shall be imprisoned for the space of three months, for any debt or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this act, such debtor may and shall be entitled to relief, under any such laws for the relief of insolvent debtors, this act notwithstanding.

SEC. 62. And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

SEC. 63. And be it further enacted, That nothing contained in this act shall be taken or construed to invalidate or impair any lien existing at the date of this act upon the lands or chattels of any person who may have become a bankrupt.

SEC. 64. And be it further enacted, That this act shall continue in force

during the term of five years, and from thence to the end of the next session of congress thereafter, and no longer: Provided, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

An Act to provide for the more convenient organization of the Courts of the United States.

(February 13, 1801.)

SEC. 12. The said circuit courts respectively shall have cognizance, concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish an uniform system of bankruptcy throughout the United States; and each circuit judge, within his respective circuit, shall and may perform, all and singular, the duties enjoined by the said act upon a judge of a district court: and the proceedings under a commission of bankruptcy which shall issue from a circuit judge shall, in all respects, be conformable to the proceedings under a commission of bankruptcy which shall issue from a district judge, mutatis mutandis.

An Act to amend the judicial system of the United States.

(April 29, 1802.)

SEC. 11. In all cases in which proceedings shall, on the said first day of July next, be pending under a commission of bankruptcy issued in pursuance of the aforesaid act, entitled "An act to provide for the more convenient organization of the courts of the United States," the cognizance of the same shall be, and hereby is, transferred to, and vested in, the district judge of the district within which such commission shall have issued, who is hereby empowered to proceed therein in the same manner and to the same effect as if such commission of bankruptcy had been issued by his order.

GENERAL ORDERS IN BANKRUPTCY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature

of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit court or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall

be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file,

within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X.

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days

after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the postoffice box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person

executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or any officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the

depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a right of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause,

and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are

not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

AMENDMENT TO GENERAL ORDERS IN BANKRUPTCY No. 35.

It is ordered by the Court that General Order in Bankruptcy No. 35 be amended by adding the following sentence to subdivision 4:

He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act of the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceed-

ings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

OFFICIAL FORMS IN BANKRUPTCY.

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, s. 20.]

[FORM NO. 1.]

Debtor's Petition.

To the Honorable ,

Judge of the District Court of the United States
for the District of

The petition of , of , in the county of , and district and State of , ... [*state occupation*], respectfully represents:

That he has had his principal place of business [*or has resided, or has had his domicil*] for the greater portion of six months next immediately preceding the filing of this petition at , within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

..... , *Attorney.*

United States of America, District of , ss:

I, ... , the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

..... , *Petitioner.*

Subscribed and sworn to before me this day of , A. D. 19...

..... ,
..... ,
(*Official character.*)

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence, (if unknown, that fact must be stated.)	When and where contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
						\$	cts.
(1.) Taxes and debts due and owing to the United States.							
(2.) Taxes due and owing to the State of—, or to any county, district, or municipality thereof.							
(3.) Wages due workmen, clerks,* or servants, to an amount not exceeding \$300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.							
Total.....							

*Also traveling and city salesmen.

....., Petitioner.

SCHEDULE A. (5)

Accommodation paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if un- known, that fact must be stated.)	Names and resi- dences of persons accommodated.	Place where contracted.	Whether liability was con- tracted as partner or joint contractor, or with any other person; and, if so, with whom?	Amount.	
						\$	cts.
					Total.....		

....., *Petitioner.*

OATH TO SCHEDULE A.

United States of America, District of ss.

On this day of A. D. 19.., before me personally came, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this day of, A. D. 19....

....., [Official character.]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particu- lars relating thereto.	Estimated value.	
			\$	cts.

....., *Petitioner.*

SCHEDULE B. (2)

Personal property.

	\$	cts.
a Cash on hand.....		
b Bills of exchange, promissory notes, or securities of any description (each to be set out separately).....		
c Stock in trade, in — business of —, at —, of the value of		
d Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.....		
e Books, prints, and pictures, viz.....		
f Horses, cows, sheep, and other animals (with number of each), viz.....		
g Carriages and other vehicles, viz.....		
h Farming stock and implements of husbandry, viz.....		
i Shipping, and shares in vessels, viz.....		
k Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.....		
l Patents, copyrights, and trade-marks, viz.....		
m Goods or personal property of any other description, with the place where each is situated, viz.....		
Total.....		

....., *Petitioner.*

SCHEDULE B. (3)

Choses in action.

	\$	cts.
a Debts due petitioner on open account.....		
b Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds.....		
c Policies of insurance.....		
d Unliquidated claims of every nature, with their estimated value.....		
e Deposits of money in banking institutions and elsewhere		
	Total.....	

....., *Petitioner.*

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

IN. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General Interest.	Particular description.	Supposed value of my interest.	
		\$	cts.
Interest in land.....			
Personal property.....			
Property in money, stock, shares, bonds, annuities, etc....			
Rights and powers, legacies and bequests.....			
Total.....			
Property heretofore conveyed for benefit of creditors.			
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.....		Amount realized from proceeds of property conveyed.	
		\$	cts.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy			
Total.....			

....., *Petitioner.*

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

	Valuation.	
	\$	cts.
Military uniform, arms, and equipments.....		
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.....		
	Total.....	

....., Petitioner.

SCHEDULE B. (6)

*Books, papers, deeds, and writings relating to bankrupt's
business and estate.*

The following is a true list of all books, papers, deeds and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

....., *Petitioner.*

OATH TO SCHEDULE B.

United States of America, District of, ss:

On this day of, A. D. 19.., before me personally came the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

.....,
.....,
[Official character.]

SUMMARY OF DEBTS AND ASSETS.

(From the statements of the bankrupt in Schedules A and B.)

Schedule A...	1 (1) Taxes and debts due United States....		
Schedule A...	1 (2) Taxes due States, counties, districts, and municipalities		
Schedule A...	1 (3) Wages		
Schedule A...	1 (4) Other debts preferred by law.....		
Schedule A...	2 Secured claims.....		
Schedule A...	3 Unsecured claims.....		
Schedule A...	4 Notes and bills which ought to be paid by other parties thereto.....		
Schedule A...	5 Accommodation paper.....		
	Schedule A, total.....		
Schedule B...	1 Real estate.....		
Schedule B...	2 a Cash on hand.....		
Schedule B...	2 b Bills, promissory notes, and securities..		
Schedule B...	2 c Stock in trade.....		
Schedule B...	2 d Household goods, etc.....		
Schedule B...	2 e Books, prints, and pictures.....		
Schedule B...	2 f Horses, cows, and other animals.....		
Schedule B...	2 g Carriages and other vehicles.....		
Schedule B...	2 h Farming stock and implements.....		
Schedule B...	2 i Shipping and shares in vessels.....		
Schedule B...	2 k Machinery, tools, etc.....		
Schedule B...	2 l Patents, copyrights, and trade-marks...		
Schedule B...	2 m Other personal property.....		
Schedule B...	3 a Debts due on open accounts.....		
Schedule B...	3 b Stocks, negotiable bonds, etc.....		
Schedule B...	3 c Policies of insurance.....		
Schedule B...	3 d Unliquidated claims.....		
Schedule B...	3 e Deposits of money in banks and elsewhere		
Schedule B...	4 Property in reversion, remainder, trust, etc.		
Schedule B...	5 Property claimed to be excepted.....		
Schedule B...	6 Books, deeds, and papers.....		
	Schedule B, total.....		

[FORM No. 2.]

Partnership Petition.

To the Honorable ,
Judge of the District Court of the United States
for the District of :

The petition of respectfully represents :

That your petitioners and have been partners under the firm name of , having their principal place of business at , in the county of , and district and State of , for the greater portion of the six months next immediately preceding the filing of this petition ; that the said partners owe debts which they are unable to pay in full ; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts ; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts ; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto, marked G, verified by his oath, contains a full and true statement of all his in-

dividual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

.....,

.....,

.....,

Petitioners.

....., *Attorney*...

....., the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

.....,

.....,

.....,

Petitioners.

Subscribed and sworn to before me this day of, A. D. 19...

.....,

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No 3.]

Creditor's Petition.

To the Honorable , Judge of the District Court of the
United States for the district of

The petition of , of , and , of
and of , respectfully shows:

That , of , has for the greater portion of six
months next preceding the date of filing this petition, had his principal
place of business, [*or resided, or had his domicile*] at , in the county
of and State and district aforesaid, and owes debts to the amount
of \$1,000.*

That your petitioners are creditors of said , having prov-
able claims amounting in the aggregate, in excess of securities held by
them, to the sum of \$500. That the nature and amount of your petitioners'
claims are as follows:

And your petitioners further represent that said is in-
solvent, and that within four months next preceding the date of this
petition the said committed an act of bankruptcy, in that
he did heretofore, to wit, on the day of

Wherefore your petitioners pray that service of this petition, with a
subpœna, may be made upon , as provided in the acts of
Congress relating to bankruptcy, and that he may be adjudged by the court
to be a bankrupt within the purview of said acts.

..... ,
..... ,
..... ,
..... ,

Petitioners.

..... *Attorney.*

United States of America, District of ss:

..... , ... , ... , being three of the peti-
tioners above named, do hereby make solemn oath that the statements
contained in the foregoing petition, subscribed by them, are true.

Before me, ... , this day of , 19...

..... ,
..... ,
[*Official character.*]

*[And is not a wage-earner nor chiefly engaged in farming or the tillage of
the soil; (or, if a corporation), is a corporation principally engaged in, etc.,.....]

[FORM NO. 4.]

Order to Show Cause upon Creditor's Petition.

In the District Court of the United States for the District of
 In the matter of
 Bankrupt.

In Bankruptcy.

Upon consideration of the petition of that
 be declared a bankrupt, it is ordered that the said
 do appear at this court, as a court of bankruptcy, to be holden at,
 in the district aforesaid, on the day of, at .. o'clock in the
 noon, and show cause, if any there be, why the prayer of said
 petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ
 of subpœna, be served on said, by delivering the same to
 him personally or by leaving the same at his last usual place of abode in
 said district, at least five days before the day aforesaid.

Witness the Honorable, judge of the said court, and the
 seal thereof, at, in said district, on the day of,
 A. D. 19...

.....,
Clerk.

[FORM NO. 5.]

Subpœna to Alleged Bankrupt.

United States of America, ... District of

To, in said district, greeting:

For certain causes offered before the District Court of the United States
 of America within and for the district of, as a court of bank-
 ruptcy, we command and strictly enjoin you, laying all other matters aside
 and notwithstanding any excuse, that you personally appear before our
 said District Court to be holden at, in said district, on the
 day of, A. D. 19..., ... to answer to a petition filed
 by in our said court, praying that you may be adjudged
 a bankrupt; and to do further and receive that which our said District
 Court shall consider in this behalf. And this you are in no wise to omit,
 under the pains and penalties of what may befall thereon.

Witness the Honorable, judge of said court, and the
 seal thereof, at, this day of, A. D. 19...

.....,
Clerk

[FORM No. 6.]

Denial of Bankruptcy.

In the District Court of the United States for the District of
 In the matter of
Bankrupt.

In Bankruptcy.

At, in said district, on the day of, A. D. 19...

And now the said appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or, he demands that the same may be inquired of by a jury*].

.....,
 Subscribed and sworn to before me this day of, A. D. 19...

 [Official character.]

[FORM No. 7.]

Order for Jury Trial.

In the District Court of the United States for the District of
 In the matter of
Bankrupt.

In Bankruptcy.

At, in said district, on day of, A. D. 19...,

Upon the demand in writing filed by , alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency, may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

.....,
Clerk.

[FORM No. 8.]

Special Warrant to Marshal.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the day of, A. D. 19.., filed against of the county of and State of, in said district, and said petition is still pending; and whereas it satisfactorily appears that said has committed an act of bankruptcy [*or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value*], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable judge of the said court, and the seal thereof, at, in said district, on the day of, A. D. 19...

.....,
Clerk.

RETURN OF THE MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named, and of all his deeds, books of account, and papers which have come to my knowledge.

.....,
Marshal [or Deputy Marshal].

Fees and expenses.

	\$	cts.
1. Service of warrant.....		
2. Necessary travel, at the rate of six cents a mile each way....		
3. Actual expenses in custody of property and other services as follows		
[Here state the particulars]		

.....,
Marshal [or Deputy Marshal].

District of, A. D. 19...

Personally appeared before me the said, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

.....,
Referee in Bankruptcy.

[FORM No. 9.]

Bond of Petitioning Creditor.

Know all men by these presents: That we, ... , as principal, and , as sureties, are held and firmly bound unto , in the full and just sum of dollars, to be paid to the said , executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of , A. D. 19..

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the district of against the said , and the said has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said , subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said shall indemnify the said for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in

presence of..	 [SEAL.]
.	 [SEAL.]
.	 [SEAL.]

Approved this day of , A. D. 19..

.

District Judge.

[FORM No. 10.]

Bond to Marshal.

Know all men by these presents: That we, ... , as principal, and , as sureties, are held and firmly bound unto , marshal of the United States for the district of , in the full and just sum of dollars, to be paid to the said , his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Signed and sealed this day of , A. D. 19..

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the district of against the said , and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said , subject

to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said has ordered the said property to be released to him.

Now, therefore, if the said property shall be released according to the said, and the said, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the

presence of. [SEAL.]

..... [SEAL.]

..... [SEAL.]

Approved this day of, A. D. 19...

.....

District Judge.

[FORM NO. 11.]

Adjudication that Debtor is not Bankrupt.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

At, in said district, on the day of, A. D. 19... before the Honorable, judge of the district of

This cause came on to be heard at, in said court, upon the petition of that be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any,*] it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable judge of said court, and the seal thereof, at, in said district, on the day of, A. D. 19...

.....

Clerk.

[FORM No. 12.]

Adjudication of Bankruptcy.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

At, in said district, on the day of, A. D. 18.., before the Honorable, judge of said court in bankruptcy, the petition of that be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable, judge of said court, and the seal thereof, at, in said district, on the day of, A. D. 19...

.....,
Clerk.

[FORM No. 13.]

Appointment, Oath, and Report of Appraisers.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

It is ordered that, of, ... of, and, of, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

.... District of, ss:

Personally appeared the within named and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

.....
.....
.....

Subscribed and sworn to before me this day of, A. D. 19...

.....,
[Official character.]

We, the undersigned, having been notified that we were appointed to

[FORM No. 15.]

Order of Reference in Judge's Absence.

In the District Court of the United States for the District of
In the matter of
..... Bankrupt.

In Bankruptcy.

Whereas on the day of, A. D. 19.., a petition was filed to have of in the county of and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said shall attend before the said referee on the day of, A. D. 19.., at

Witness my hand and the seal of the said court, at, in said district, on the day of, A. D. 19...

.....,
Clerk.

[FORM No. 16.]

Referee's Oath of Office.

I, ..., do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

.....
Subscribed and sworn to before me this day of, A. D. 19...
.....,
District Judge.

[FORM No. 17.]

Bond of Referee.

Know all men by these presents: That we of as principal, and of and of, as sureties, are held and firmly bound to the

United States of America in the sum of dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of, A. D. 19...

The condition of this obligation is such that whereas the said has been on the day of, A. D. 19.., appointed by the Honorable judge of the district court of the United States for the district of, a referee in bankruptcy, in and for the county of, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

....., [L. S.]

....., [L. S.]

....., [L. S.]

Approved this day of, A. D. 19...

.....,
District Judge.

[FORM NO. 18.]

Notice of First Meeting of Creditors.

In the District Court of the United States for the District of
In Bankruptcy.

In the matter of
..... Bankrupt.

In Bankruptcy.

To the creditors of of, in the county of,
and district aforesaid, a bankrupt.

Notice is hereby given that on the day of, A. D. 19.., the said was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at in, on the day of, A. D. 19.., at .. o'clock in the noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

.....,
Referee in Bankruptcy.

....., 19...

submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the day of, A. D. 19...

....., [L. S.]
Signed, sealed, and delivered in the presence of..

.....
Acknowledge before me this day of, A. D. 19...

.....,
[Official character.]:

[FORM No. 21.]

Special Letter of Attorney in Fact.

In the matter of

..... Bankrupt.

In Bankruptcy.

To,

.....:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at, on the day of, before, or any adjournment thereof, and then and there for and in name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

In witness whereof I have hereunto signed my name and affixed my seal the day of, A. D. 19...

....., [L. S.]..
Signed, sealed, and delivered in presence of..

.....
Acknowledge before me this day of, A. D. 19...

.....,
[Official character.]

[FORM NO. 22.]

Appointment of Trustee by Creditors.

In the District Court of the United States for the District of
In the matter of
.....Bankrupt.

In Bankruptcy.

At, in said district, on the day of, A. D. 19...
before, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are at present at this meeting, do hereby appoint, of, in the county of and State of, to be the trustee of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		\$	cts.

Ordered that the above appointment of trustee— be, and the same is hereby, approved.

.....,
Referee in Bankruptcy.

[FORM No. 23.]

Appointment of Trustee by Referee.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

At, in said district, on the day of, A. D. 19.., before, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint, of, in the county of and State of, as trustee of the same.

.....,
Referee in Bankruptcy.

[FORM No. 24.]

Notice to Trustee of his Appointment.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

To, of, in the county of, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or one of the trustees*] of the estate of the above-named bankrupt at the first meeting of the creditors, on the day of, A. D. 19.., and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at the day of, A. D. 19..

.....,
Referee in Bankruptcy.

[FORM No. 25.]

Bond of Trustee.

Know all men by these presents: That we, ... of as principal, and of and of as sureties, are held and firmly bound unto the United States of America in the sum of dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of, A. D. 19..

The condition of this obligation is such that whereas the above-named was, on the day of, A. D. 19.., appointed trustee in the case pending in bankruptcy in said court, wherein is the bankrupt, and he, the said, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
presence of..

.....	, [SEAL.]
.....	, [SEAL.]
	, [SEAL.]

[FORM No. 26.]

Order Approving Trustee's Bond.

At a court of bankruptcy, held in and for the District of, at, ..., this day of, 19...

Before, referee in bankruptcy, in the District Court of the United States for the District of

In the matter of
..... Bankrupt.

In Bankruptcy.

It appearing to the Court of, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [or by order of the court], to wit, in the sum of dollars it is ordered that the said bond be, and the same is hereby, approved.

.....,
Referee in Bankruptcy.

[FORM NO. 27.]

Order that no Trustee be Appointed.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

.....,
Referee in Bankruptcy.

[FORM NO. 28.]

Order for Examination of Bankrupt.

In the District Court of the United States for the District of

In the Matter of

..... Bankrupt.

In Bankruptcy.

At, on the day of, A. D. 19...

Upon the application of, trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before, one of the referees in bankruptcy of this court, at on the day of, at .. o'clock in the noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

.....,
Referee in Bankruptcy.

[FORM NO. 29.]

Examination of Bankrupt or Witness.

In the District Court of the United States for the District of

In the Matter of

..... Bankrupt.

In Bankruptcy.

At, in said district, on the day of, A. D. 19..., before, one of the referees in bankruptcy of said court.

....., of, in the county of, and State of, being duly sworn and examined at the time and place above mentioned, upon his oath says. [*Here insert substance of examination of party.*]

.....,
Referee in Bankruptcy.

[FORM NO. 30.]

Summons to Witness.

To:

Whereas of, in the county of, and State of, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the District of

These are to require you, to whom this summons is directed, personally to be and appear before one of the referees in bankruptcy of the said court, at, on the day of, at .. o'clock in the noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable, judge of said court, and the seal thereof at, this day of, A. D. 19...

.....,
Clerk.

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the District of

In the Matter of

.....Bankrupt.

In Bankruptcy.

On this day of, A. D. 19.., before me came, of, in the county of and State of, and makes oath, and says that did, on, the day of, A. D. 19.., personally serve of, in the county of and State of, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

Subscribed and sworn to before me this day of, A. D. 19...

.....
.....

[FORM NO. 31.]

Proof of Unsecured Debt.

In the District Court of the United States for the District of

In the Matter of

.....Bankrupt.

In Bankruptcy.

At, in said district of, on the day of, A. D. 19.., came of in the county of, in said district of, and made oath, and says that the person by [*or against*] whom a petition for adjudication of bank-

ruptcy has been filed, was at and before the filing of said petition and still is, justly and truly indebted to said deponent in the sum of dollars; that the consideration of said debt is as follows:.....

.....
that no part of said debt has been paid [except that there are no set-offs or counterclaims to the same [except.....

.....
and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

.....,
Creditor

Subscribed and sworn to before me this day of, A. D. 19..

.....,
[*Official character.*]

[FORM NO. 32.]

Proof of Secured Debt.

In the District Court of the United States for the District of

In the Matter of

.....Bankrupt.

In Bankruptcy.

At, in said district of, on the day of, A. D. 19.., came, of, in the county of, in said district of, and made oath, and says that, the person by [*or against*] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of dollars; that the consideration of said debt is as follows:

.....
that no part of said debt has been paid [except

.....,
that there are no set-offs or counterclaims to the same [except

.....
and that the only securities held by this deponent for said debt are the following:

.....,
Creditor.

Subscribed and sworn to before me this day of, A. D. 19..

.....,
[*Official character.*]

[FORM NO. 33.]

Proof of Debt Due Corporation.

In the District Court of the United States for the District of
In the Matter of
..... Bankrupt.

In Bankruptcy.

At, in said district of, on the day of, A. D. 19.., came, of, in the county of, and State of, and made oath and says that he is of the, a corporation incorporated by and under the laws of the State of, and carrying on business at, in the county of, and State of, and that he is duly authorized to make this proof, and says that the said, the person by [*or against*] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of dollars; that the consideration of said debt is as follows:

.....
that no part of said debt has been paid [except

.....
that there are no set-offs or counterclaims to the same [except

.....
and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

.....,
..... of said Corporation...
Subscribed and sworn to before me this day of, A. D. 19..
.....
[*Official character.*]

[FORM NO. 34.]

Proof of Debt by Partnership.

In the District Court of the United States for the District of
In the Matter of
..... Bankrupt.

In Bankruptcy.

At, in said district of, on the day of, A. D. 19.., came, of, in the county of, in said district of, and made oath and says that he is one of the firm of, consisting of himself and, of, in the county of and State of; that the said, the person by [*or against*] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still

is, justly and truly indebted to this deponent's said firm in the sum of dollars; that the consideration of said debt is as follows:

 that no part of said debt has been paid [except

 that there are no set-offs or counterclaims to the same [except
 and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

.....
Creditor.

Subscribed and sworn to before me this day of, A. D. 19...

.....
 [Official character.]

—
 [FORM NO. 35.]

Proof of Debt by Agent or Attorney.

In the District Court of the United States for the District of

In the Matter of

..... Bankrupt.

In Bankruptcy.

At, in said district of, on the day of, A. D. 19.., came, of, in the county of, and State of, attorney [or authorized agent] of, in the county of, and State of, and made oath and says that the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said, in the sum of dollars; that the consideration of said debt is as follows:

 that no part of said debt has been paid [except

 and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition can not be made by the claimant in person because

 and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

Subscribed and sworn to before me this day of, A. D. 19...

.....
 [Official character.]

[FORM No. 36.]

Proof of Secured Debt by Agent.

In the District Court of the United States for the District of

In the Matter of

..... Bankrupt.

In Bankruptcy.

At, in said district of, on the day of, A. D. 19.., came, of, in the county of, and State of, attorney [*or*, authorized agent] of, in the county of, and State of, and made oath, and says that, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said in the sum of dollars; that the consideration of said debt is as follows:

.....
that no part of said debt has been paid [except.....

.....
that there are no set-offs or counter claims to the same [except
and that the only securities held by said for said debt are the following:

.....
and this deponent further says that this deposition can not be made by the claimant in person because

.....
and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

.....
Subscribed and sworn to before me this day of, A. D. 19...

.....
[*Official character.*]

[FORM No. 37.]

Affidavit of Lost Bill, or Note.

In the District Court of the United States for the District of

In the Matter of

..... Bankrupt.

In Bankruptcy.

On this ... day of, A. D. 19.., at, came, of, in the county of, and State of, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, ...

.....

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said , or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or note*], nor in any manner parted with or assigned the legal or beneficial interests therein, or any part thereof; and that he, this deponent is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

. ,

Subscribed and sworn to before me this day of , A. D. 19...

. ,

[*Official character.*]

[FORM NO. 38.]

Order Reducing Claim.

In the District Court of the United States for the District of

In the Matter of

. Bankrupt.

In Bankruptcy.

At , in said district, on the day of , A. D. 19...

Upon the evidence submitted to this court upon the claim of against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of , as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of , and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the day of , A. D. 19...]

.

Referee in Bankruptcy.

[FORM No. 41.]

Notice of Dividend.

In the District Court of the United States for the District of
In the Matter of

..... Bankrupt.

In Bankruptcy.

At, on the day of, A. D. 19... To,
Creditor of, bankrupt:

I hereby inform you that you may, on application at my office, ...,
on the day of, or on any day thereafter, between the hours of
....., receive a warrant for the dividend due to you out of the
above estate. If you can not personally attend, the warrant will be de-
livered to your order on your filing up and signing the subjoined letter.

....., *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To,

Trustee in bankruptcy of the estate of bankrupt:

Please deliver to the warrant for dividend payable out of
the said estate to me.

....., *Creditor.*

[FORM No. 42.]

Petition and Order for Sale by Auction of Real Estate.

In the District Court of the United States for the District of
In the matter of

..... Bankrupt.

In Bankruptcy.

Respectfully represents, trustee of the estate of said bankrupt,
that it would be for the benefit of said estate that a certain portion of the
real estate of said bankrupt, to wit: [*here describe it and its estimated
value*] should be sold by auction, in lots or parcels, and upon terms and
conditions, as follows:
Wherefore he prays that he may be authorized to make sale by auction of
said real estate as aforesaid.

Dated this day of, A. D. 19...

....., *Trustee.*

The foregoing petition having been duly filed, and having come on for a
hearing before me, of which hearing ten days' notice was given by mail to
creditors of said bankrupt, now, after due hearing, no adverse interest
being represented thereat [*or after hearing in favor of said
petition and in opposition thereto*], it is ordered that the
said trustee be authorized to sell the portion of the bankrupt's real estate
specified in the foregoing petition, by auction, keeping an accurate account

of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

[FORM NO. 43.]

Petition and Order for Redemption of Property from Lien.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

Respectfully represents , trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describing the origin and nature of the lien*], [*or, if the property be personal property, has been pledged or deposited and is subject to a lien*] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of, being the amount of said lien, in order to redeem said property therefrom.

Dated this day of, A. D. 19...

....., Trustee....

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing in favor of said petition and in opposition thereto*], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

[FORM NO. 44.]

Petition and Order for Sale Subject to Lien.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

Respectfully represents , trustee of the estate of said

bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it should be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this day of, A. D. 19...

....., *Trustee.*

The foregoing petition having been duly filed and having come on for hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing in favor of said petition and in opposition thereto*], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or, at private sale*], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

[FORM NO. 45.]

Petition and Order for Private Sale.

In the District Court of the United States for the District of
In the matter of

..... Bankrupt.

In Bankruptcy.

Respectfully represents , duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, ...
.....
it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit:.....
.....

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this day of, A. D. 19...

....., *Trustee.*

The foregoing petition having been duly filed and having come on for a

hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing in favor of said petition and in opposition thereto], it is ordered that the said trustee be authorized to sell a portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

[FORM NO. 46.]

Petition and Order for Sale of Perishable Property.

In the District Court of the United States for the District of
In the Matter of

..... Bankrupt.

In Bankruptcy.

Respectfully represents the said bankrupt, [*or* a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit, ...
.....
now in, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this day of, A. D. 19...

.....,

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or* without notice to the creditors], now, after due hearing, no adverse interest being represented thereat, [*or* after hearing in favor of said petition and in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this day of, A. D. 19...

Referee in Bankruptcy.

[FORM NO. 47.]

Trustee's Report of Exempted Property.

In the District of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

At, on the day of, 19...

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		\$	cts.
Military uniforms, arms, and equipments			
Property exempted by State laws			

....., *Trustee.*

[FORM NO. 48.]

Trustee's Return of No Assets.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

At, in said district, on the day of, A. D. 19...

On the day aforesaid, before me comes, of, in the county of and State of, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at, this day of A. D. 19...

.....,
Referee in Bankruptcy.

[Form No. 49.]

Account of Trustee.

[illegible]

[FORM No. 50.]

Oath to Final Account of Trustee.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

On this day of A. D. 19.., before me comes
, of, in the county of and State of ... , and
 makes oath, and says that he was, on the day of, A. D. 19..,
 appointed trustee of the estate and effects of the above-named bankrupt,
 and that as such trustee he has conducted the settlement of the said estate.
 That the account hereto annexed containing sheets of paper, the
 first sheet whereof is marked with the letter [*reference may here also
 be made to any prior account filed by said trustee*] is true, and such ac-
 count contains entries of every sum of money received by said trustee on
 account of the estate and effects of the above-named bankrupt, and that
 the payments purporting in such account to have been made by said trustee
 have been so made by him. And he asks to be allowed for said payments
 and for commissions and expenses as charged in said accounts.

....., *Trustee...*

Subscribed and sworn to before me at, in said district of,
 this day of, A. D. 19...

.....,
 [Official character.]

[FORM No. 51.]

Order Allowing Account and Discharging Trustee.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

The foregoing account having been presented for allowance, and having
 been examined and found correct, it is ordered that the same be allowed,
 and that the said trustee be discharged of his trust.

.....,
Referee in Bankruptcy.

[FORM No. 52.]

Petition for Removal of Trustee.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

To the Honorable ,

Judge of the District Court for the District of

The petition of , one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that , heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*here set forth the particular cause or causes for which such removal is requested.*]

Wherefore pray that notice may be served upon said , trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

.....

[FORM No. 53.]

Notice of Petition for Removal of Trustee.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

At , on the day of , A. D. 19...

To ,

Trustee of the estate of , bankrupt:

You are hereby notified to appear before this court, at , on the day of , A. D. 19.., at .. o'clock ... m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of , one of the creditors of said bankrupt, filed in this court on the day of , A. D. 19.., in which it is alleged [*here insert the allegation of the petition*].

..... ,

Clerk.

[FORM NO. 54.]

Order for Removal of Trustee.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

Whereas of, did, on the day of , A. D. 19.., present his petition to this court, praying that for the reasons therein set forth, ... the trustee of the estate of said , bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said , trustee [or, out of the estate of the said , subject to prior charges.]

Witness the Honorable , judge of the said court, and the seal thereof, at, in said district, on the day of, A. D. 19...

.....
Clerk.

[FORM NO. 55.]

Order for Choice of New Trustee.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

At, on the day of, A. D. 18...

Whereas by reason of the removal [or the death or resignation] of , heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at, in, in said district, on the day of, A. D. 19.., for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

.....
Referee in Bankruptcy.

[FORM No. 56.]

Certificate by Referee to Judge.

In the District Court of the United States for the District of ,....

In the matter of

..... Bankrupt.

In Bankruptcy.

I, ..., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings; [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon

Dated this day of, A. D. 19...

.....,
Referee in Bankruptcy.

[FORM No. 57.]

Bankrupt's Petition for Discharge.

In the matter of

..... Bankrupt.

In Bankruptcy.

To the Honorable,

Judge of the District Court of the United States for the District
of

....., of, in the county of and State of, in said district, respectfully represents that on the day of, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this day of, A. D. 19...

....., *Bankrupt.*

ORDER OF NOTICE THEREON.

District of, ss:

On this day of, A. D. 19.., on reading the foregoing petition, it is..

Ordered by the court, that a hearing be had upon the same on the day of, A. D. 19.., before said court, at, in said district,

at o'clock in the noon; and that notice thereof be published in , a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable , judge of the said court, and the seal thereof, at in said district, on the day of , A. D. 19...

..... ,

Clerk.

.... hereby depose, on oath, that the foregoing order was published in the on the following days, viz:

On the day of and on the day of , in the year 19...

.....

District of

..... , 19...

Personally appeared , and made oath that the foregoing statement by him subscribed is true.

Before me,

..... ,

[*Official character.*]

I hereby certify that I have on this day of , A. D. 19.., sent by mail copies of the above order, as therein directed.

..... ,

Clerk.

[FORM NO. 58.]

Specifications of Grounds of Opposition to Bankrupt's Discharge.

In the District Court of the United States for the District of

In the matter of

..... Bankrupt.

In Bankruptcy.

..... , of , in the county of , and State of , a party interested in the estate of said , bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specifications [*Here specify the grounds of opposition.*]

..... , *Creditor.*

[FORM No. 59.]

Discharge of Bankrupt.

District Court of the United States,

..... District of

Whereas, ... of in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the day of, A. D. 19.., on which day the petition for adjudication was filed him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable, judge of said district court, and the seal thereof this day of, A. D. 19...

.....
Clerk.

[FORM No. 60.]

Petition for Meeting to Consider Composition.

District Court of the United States for the District of
..... Bankrupt.

In Bankruptcy.

To the Honorable, Judge of the District Court of the United States for the, District of

The above-named bankrupt respectfully represents that a composition of per cent. upon all unsecured debts, not entitled to a priority in satisfaction of debts has been proposed by to creditors, as provided by the acts of Congress relating to bankruptcy, and verily believe that the said composition will be accepted by a majority in number and in value of creditors whose claims are allowed.

Wherefore, he pray that a meeting of creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

.....
Bankrupt.

[FORM No. 61.]

Application for Confirmation of Composition.

In the District Court of the United States for the District of

In the matter of "

..... Bankrupt.

*In Bankruptcy.*To the Honorable Judge of the District Court of the
United States for the District of

At, in said district, on the day of, A. D. 19... now comes, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of dollars, has been deposited, subject to the order of the judge, in the National Bank, of, a designated depository of money in bankruptcy cases.

Wherefore the said respectfully asks that the said composition may be confirmed by the court.

.....,
Bankrupt.

[FORM No. 62.]

Order Confirming Composition.

In the District Court of the United States for the District of

In the Matter of

..... Bankrupt.

In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts

or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to Bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable, judge of said court, and the seal thereof, this day of, A. D. 19...

.,
Clerk.

[FORM No. 63.]

Order for Distribution on Composition.

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of

In the matter of

. Bankrupt.

In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3r, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable, judge of said court, and the seal thereof, this day of, A. D. 19...

.,
Clerk.

UNOFFICIAL FORMS IN BANKRUPTCY.

The following forms are not to be understood as in any way official or prescribed by authority. They are simply suggested forms for supplementing the official forms prescribed by the Supreme Court, and are merely the result of the writer's experience.

UNOFFICIAL FORMS IN BANKRUPTCY.

[UNOFFICIAL FORM No. 1.]

Voluntary Petition of Corporation.

United States District Court for the District of
In Bankruptcy.

In the matter of
.....Company
Bankrupt

}

To the Honorable ,

Judge of the United States District Court.

The petition of , of in the County of
..... and District and State of , respectfully represents:

That it is a corporation duly organized under the laws of the State of and is engaged in the business of and is not a municipal, railroad, insurance nor banking corporation;

That it has had its principal place of business [or has resided or had its domicile] for the greater portion of the six months next immediately preceding the filing of this petition at , within said judicial district; that it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors, and that it desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked "A" and verified by the oath of your petitioner's proper officer, contains a full and true statement of all its debts, and (so far as it is possible to ascertain) the names and places of residence of its creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked "B" and verified by the oath of your petitioner's proper officer, contains an accurate inventory of all its property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

That an authentic copy of the vote or resolution authorizing the filing of this petition is as follows, [or is attached hereto as Exhibit "C"].

Wherefore your petitioner prays that it may be adjudged by the Court to be a bankrupt within the purview of said acts.

[Seal, in States where seals are necessary]

.....

by
its

United States of America, District of ss:

I, ..., am the [here insert the official capacity of the affiant] of the corporation which is the petitioning debtor mentioned and described in the foregoing petition, and I do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

Subscribed and sworn to before me this day of 19...

.....
Official Character.

[UNOFFICIAL FORM NO. 2.]

**Resolution of Stockholders, Directors, etc., Authorizing Voluntary
 Bankruptcy of Corporation.**

"At a meeting of the stockholders [or, of the Board of Directors or Trustees, as the case may be] of the Company [or "Association" or "Society" or "Corporation," etc., etc.] a corporation created under the laws of the State of held at in the County of and State of, on this day of A. D., ... the condition of the affairs of said corporation having been inquired into and it having been ascertained to the satisfaction of said meeting that the said corporation is insolvent, and that its affairs ought to be wound up, it was voted [or resolved] by a majority of the corporators [or stockholders, or directors or trustees] present at such meeting (which was duly called and notified for the purpose of taking action upon the subject aforesaid) that be and he thereby was authorized, empowered and required to file a petition in the District Court of the United States for the District of, within which said corporation has had its residence, domicile or principal place of business during the greater portion of the preceding six months, for the purpose of having the same adjudged Bankrupt, and that such proceedings be had thereon as are provided by the act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, and acts amendatory thereof.

In Witness Whereof, I have hereunto subscribed my name as of said Corporation and affixed the seal of the same this day of 19....

.....
of said Corporation.

[Corporate Seal]

[UNOFFICIAL FORM NO 3.]

Involuntary Petition against Corporation.

United States District Court for the District of
..... Division.

In Bankruptcy.

....., ..., and,
....., Petitioning Creditors }
v.
....., [Alleged]* Bankrupt. }

To the Hon., Judge of the United States District Court:

The petition of, of, and of
..... and of respectfully represents:

That is a corporation duly organized under the laws of
the State of and has for the greater portion of the six
months next preceding the date of filing this petition, had its principal
place of business [or had its residence or its domicile] at,
in the County of and State and District aforesaid, and owes
debts to the amount of \$1,000, and is a moneyed corporation [or a "busi-
ness" corporation or "commercial" corporation as the case may be] and
is not a municipal, railroad, insurance nor banking corporation.

That your petitioners are creditors of said, having prov-
able claims amounting in the aggregate, in excess of securities held by them,
to the sum of \$500. That the nature and amount of your petitioners' claims
are as follows: [Here set forth the nature and amount of the petitioning
creditors' claims]

And your petitioners further represent that said is insol-
vent and that within the four months next preceding the date of this petition
the said committed an act of bankruptcy, in that it did here-
tofore, to-wit, on the day of
.....

Wherefore, your petitioners pray that service of this petition, with a sub-
poena, may be made upon, as provided in the acts of Con-
gress relating to bankruptcy, and that it may be adjudged by the court to be
a bankrupt within the purview of said acts.

.....,
.....,
.....,
.....,

..... Attorney.

Petitioners.

United States of America, District of ss:

....., ..., ..., being three of the petitioners

*It is unnecessary to say "alleged" bankrupt, for by Section 1 of the Act
"bankrupt" is the term applicable before as well as after adjudication.

above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

.....
.....
.....

Before me, ..., this day of, 19...

.....,
.....,

[Official Character.]

[UNOFFICIAL FORM NO. 4.]

Appearance of Bankrupt or Creditor in Involuntary Case.

United States District Court for the District of
In Bankruptcy.

....., and,
....., Petitioning Creditors } No.
v.
....., [Alleged] Bankrupt. }

The clerk will enter my appearance for [the alleged bankrupt] [or a creditor of said alleged bankrupt] to plead or move in response to the petition herein.
Dated, 191..

.....,
Attorney for alleged bankrupt.
[or]
Attorney for creditor.

[UNOFFICIAL FORM NO 5.]

Appearance by Intervening Joining Creditor.

United States District Court for the District of
In Bankruptcy.

....., and,
....., Petitioning Creditors }
v. }
....., [Alleged] Bankrupt. }

....., a creditor of the above named against whom the petition for adjudication of bankruptcy has been filed herein, hereby appears and joins in such petition as provided by the Acts relating to bankruptcy.

.....,
Intervening Creditor
Address:
.....,
Attorney.

[UNOFFICIAL FORM NO. 6.]

Answer Alleging More than Twelve Creditors.

United States District Court for the District of

In Bankruptcy.

....., ...
, ..., and,
, Petitioning Creditors } Answer.
 v.
, [Alleged] Bankrupt.]

..... of, the person against whom a petition for adjudication of bankruptcy has been filed herein, denies [here set forth the parts of the petition that are denied, or, if so, "denies each and all of the allegations of the petition, save and except, etc."]; and further says that his creditors are twelve and more in number, and that annexed hereto is a list of his creditors with their addresses, under oath, as required by law.

Wherefore, respondent prays that said petition may be denied and dismissed.

.....,
 [Alleged] Bankrupt.

[List of Creditors and Addresses.]

Names.

Addresses.

.....

.....

United States of America,

District of, ss:

I, ..., the alleged bankrupt herein, hereby make solemn oath that the allegations and denials contained in my foregoing answer are true according to the best of my knowledge, information and belief, and also that the list annexed thereto comprises all of my creditors and gives their addresses so far as known to me.

Subscribed and Sworn to before }
 me this day of, 19... }

[UNOFFICIAL FORM NO. 7.]

Creditors' Joining Petition.

United States District Court for the District of

In Bankruptcy.

....., ..., and,
, Petitioning Creditors } Creditor's Joining Petition.
 v.
, [Alleged] Bankrupt.]

To the Hon., Judge of the United States District Court:

Your Petitioner, ..., appearing by his attorney, respectfully shows that:

Your Petitioner, ..., is a creditor of the above named, and has a provable claim against the same for the sum of \$. in excess of all securities held by him.

The nature and amount of your petitioner's claim is as follows:, and no part of said claim has been paid although duly demanded.

There has been filed in this court the petition of, ..., and, creditors of said for the adjudication of said as a bankrupt, which petition is still pending.

Your petitioner desires to join in the said petition that the said be adjudged a bankrupt.

[If the intervening creditor desires to have his petition different from the original petition, he should here frame the same in his own way.]

Wherefore, your petitioner, joining in the petition herein, prays that the said be adjudged bankrupt within the intent and meaning of the Acts relating to bankruptcy.

.,
Petitioner.

[Verification].

[UNOFFICIAL FORM NO. 8.]

Composition before Adjudication.

[For other forms in composition matters, see official forms Nos. 60, 61, 62 and 63, and unofficial forms Nos. 9 and 59.]

United States District Court for the District of

In Bankruptcy.

., and	} ,Petition.
., Petitioning Creditors	
<i>v.</i>	
., [Alleged] Bankrupt.	
[or if the petition be voluntary]	
In the Matter of	
.	
Bankrupt	

To the Hon., Judge of the United States District Court:

Your petitioner represents that he has filed [or is filing herewith] his voluntary petition for adjudication of bankruptcy, [or petitioner represents that an involuntary petition in bankruptcy has been filed against him herein],

and that the same is still pending, and that he desires to present an offer of composition to his creditors without adjudication of bankruptcy.

Petitioner has filed [or is filing herewith] a list of his creditors and a schedule of his assets in accordance with law; and is willing to present himself for examination at a meeting of his creditors, and in all things else to perform the duties required of him in the premises.

Wherefore, petitioner prays for an order referring the proceedings herein to a referee in bankruptcy and appointing a meeting of creditors for the consideration of the same.

.....

[Verification]

[Where the bankrupt is a partnership or a corporation, the above form should be adapted to the facts in the case.]

[UNOFFICIAL FORM NO. 9.]

Order of Confirmation of Composition without Adjudication of Bankruptcy.

United States District Court for the District of

In Bankruptcy.

....., ..., and,	}	Order Confirming Composition without Adjudication.
....., Petitioning Creditors		
v.		
....., Alleged Bankrupt.		
[or if the petition be voluntary]		
In the Matter of		
....., Bankrupt.		

An application for the confirmation of the composition offered by the bankrupt herein having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and money required by law to be deposited having been deposited as ordered, in such place, to wit, The Bank, as was designated by Hon., one of the judges of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the Acts of Congress relating to Bankruptcy; and it having been brought to the attention of the court that the composition herein is had without adjudication of bankruptcy, under

the Amendment of 1910, § 12 (b) of the Bankruptcy Act, and that the petition in bankruptcy herein was filed on the day of, 191..; [and it further appearing that pending the proceedings herein the bankrupt has disposed of all his rights, title and interest in and to the assets of the bankrupt estate to]

It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

And it is further ordered that the distribution of the consideration deposited for creditors shall be made by [or "by the receiver herein"] who is hereby appointed Distributing Agent for that purpose, said distribution to be made by checks drawn and signed by him as Distributing Agent, and countersigned by, Esq., the referee in charge of this case, as follows, to wit:

1. To pay the several claims which have priority;
2. To pay the costs of the proceedings, including the costs of court, the fees, commissions and expenses of the referee in bankruptcy, the commissions and expenses of the receiver, the fees of the receiver's and petitioning creditors' attorneys, the fees and disbursements of the bankrupt's attorney, as ordered or stipulated herein;
3. To pay, according to the terms of the composition, ... per cent (%) upon the several claims of general creditors which have been allowed, or which shall hereafter be allowed, and appear upon a list of allowed claims in the files of this case, which list is made a part of this order;
4. To return any balance of said deposit after the expiration of one year from the date of the filing of the bankruptcy petition herein, and the payment of all allowed claims, to, of

And it is further ordered that the creditors be and they hereby are allowed one year's time from and after the date of the filing of the bankruptcy petition herein, to wit, until the day of, 191.., within which to file their claims, or otherwise they shall be barred from participating in said fund so on deposit; and that within said period they shall file their respective claims with the referee, ... in charge of said bankruptcy, who shall hear any objections to the same and allow or disallow the same as in case of due administration in bankruptcy.

And it is further ordered that said receiver transfer and deliver to said all the assets of said bankrupt save and except such moneys belonging to said estate as have been deposited as part of the consideration to be paid to creditors upon this composition.

Witness the Hon. Judge of said Court and the seal thereof this day of, 191 ..

.....,
United States District Judge.

[UNOFFICIAL FORM NO. 10.]

Petition for Appointment of Receiver, for Seizure of Assets and to Continue the Business.

United States District Court for the District of
In Bankruptcy.

....., ..., and, ..., Petitioning Creditors v., [Alleged] Bankrupt.	}	Petition for Appointment of Receiver.
--	---	---------------------------------------

To Hon., United States District Judge:

....., one of the petitioning creditors herein [or "the bankrupt," or "a creditor,"], appearing by his attorney, respectfully represents that:

1. Heretofore, to wit, on the day of, 19.. an involuntary petition in bankruptcy was filed in this court against the alleged bankrupt, which petition is still pending.

2. Your petitioner, ..., is one of the petitioning creditors herein [or "the bankrupt" or "creditor"].

3. It is absolutely necessary for the preservation of the estate that a receiver be appointed, and this is so for the following facts, to wit: [Here set forth facts showing that it is absolutely necessary for the preservation of the estate that a receiver be appointed, as, for instance, that there is a going business, or a manufactory in full operation needing attention, etc.]

4. [Where the receiver is to take possession of the property of the bankrupt, then should follow allegations sufficient for the issuance of the "warrant of seizure" precisely as if a warrant of seizure by the marshal were asked for, for instance: Said the alleged bankrupt herein has committed an act of bankruptcy, in that [set forth the act of bankruptcy charged] [or "has neglected" or "is neglecting" or "is about to neglect" his property, "so that it has thereby deteriorated" or "is thereby deteriorating" or "is about to deteriorate thereby" in value, in this, to wit. [Here set forth the acts of neglect, etc., aptly describing the property and making sufficient statements to cover the allegations of neglect and deterioration above made]; and it is necessary and for the best interest of the parties concerned that said receiver seize upon and hold said property.]]

5. The value of said property is about \$.....

6. It is for the best interest of the estate that said receiver conduct the business of the bankrupt for a limited period, for the following facts, to wit: [Here set forth the facts showing why it is for the best interests of the parties in interest that the business be conducted for a limited period and, if possible, show what the limit of that period should likely be.]

Wherefore, your petitioner prays the court for an order appointing a receiver herein and authorizing and directing him to seize the assets be-

longing to the bankrupt estate and to conduct the business for a limited period, and for such other and further relief as in equity is just.

.....
Petitioner.

[Verification]

[UNOFFICIAL FORM NO. 11.]

Application for Appointment of Receiver before Adjudication.

[ANOTHER FORM.]

United States District Court for the District of
 In Bankruptcy.

....., ... and	} Application for Appointment of Receiver [with Warrant of Seizure].
....., Petitioning Creditors,	
v.	
....., [Alleged] Bankrupt.	

..... the applicant, is one of the petitioning creditors in the involuntary petition in bankruptcy pending herein against the alleged bankrupt above named [or, is a creditor of against whom an involuntary petition in bankruptcy is pending herein]; and moves the court for an order appointing a receiver herein [and for a warrant to issue to him, authorizing and directing him to seize the property of said alleged bankrupt and to hold the same pending the hearing upon said petition]; and this he prays upon the ground that it is absolutely necessary for the preservation of the estate [the sole ground for the appointment of a receiver in bankruptcy, see § 384] that a receiver be appointed, for the following facts, to wit: [setting forth the facts showing it is absolutely necessary for the preservation of the estate] [and, in case warrant of seizure is to issue, that said bankrupt has committed an act of bankruptcy, to-wit, has here setting up the facts constituting the act of bankruptcy, pleading them with certainty, see § 340, or that said bankrupt has neglected, or is neglecting, and is about to further neglect his property that it has deteriorated, and is thereby deteriorating, and is about to further deteriorate in value, see Bank. Act, § 69]; and this is so for the following facts, to wit, [setting forth acts of negligence, etc., and facts of deterioration.]

United States of America;

..... District of

County of;

..... being first duly sworn, upon his oath says he is a creditor [one of the petitioning creditors] in the above entitled proceedings

and that the facts stated in his foregoing application for the appointment of a receiver and for warrant of seizure are true.

Subscribed and sworn to before me by the said this day of 19....

[Official character.]

[UNOFFICIAL FORM NO. 12.]

Application for Appointment of Receiver after Adjudication

United States District Court for the District of

In Bankruptcy.

In the matter of
....., Bankrupt.

}

Application for Receiver.

..... the bankrupt [or one of the creditors] herein prays the court for an order appointing a receiver; and this he asks upon the ground that it is absolutely necessary for the preservation of the estate that a receiver be appointed [this is the sole ground available in bankruptcy for the appointment of a receiver, see § 384] to take charge of the assets and protect the same [and, if so, "to continue the business"] until the appointment of a trustee; and this is so for the following facts, to-wit:

[A composition is about to be offered by the bankrupt to his creditors and the object thereof would be defeated if the business be not continued so that the same may be turned over to the bankrupt undiminished in value as a going concern, in case said composition be confirmed.]

[Or, the assets of the bankrupt consist of a stock of groceries, which are largely of a perishable nature and should be immediately sold.]

[Or, there are unfinished goods in process of manufacture the value of which will virtually be lost if the business be not conducted to the extent, at any rate, of completing the manufacture of said goods.]

[Or, the assets are exposed and in danger of loss in the following manner, etc.]

[Or, the assets of the bankrupt occupy a room jointly with those of another person, and such person insists upon continuing his own business and in keeping the place open to the public, and the bankrupt's assets are left exposed and uncared for.]

Said assets are of the probable value of \$....

United States of America;

..... District of

County of

..... being first duly sworn, upon his oath says he is the above

Subscribed and sworn to before me by the said this day of
..... 191. ..

[Official character.]

Affidavit for Warrant of Seizure.

In Bankruptcy.

....., ... and , Petitioning Creditors <i>v.</i> , [Alleged] Bankrupt [or, after adjudication, or in cases of voluntary bankruptcy] In the Matter of , [Alleged] Bankrupt.	}	Affidavit for Warrant of Seizure.
United States of America District of State and County of	}	ss:

....., being duly sworn deposes and says that he is one of the petitioning creditors [or a creditor] of the said, against whom an involuntary petition in bankruptcy has been filed, which is now pending in the United States District Court for the District of; that the said, the alleged bankrupt, has committed an act of bankruptcy in this [here set forth the act of bankruptcy alleged [or "has neglected" or "is neglecting" or "is about to neglect" his property so that it has thereby deteriorated [or] is thereby deteriorating [or] is about thereby to deteriorate in value, in this, that [here set forth the facts showing neglect and deterioration in value.]

[Verification]

[The above form may be put into the form of a petition, positively verified if the practitioner so desires or the local rules so require.]

**Referee's Order Appointing Receiver [Involuntary Bankruptcy] and
for Warrant of Seizure.**

Upon this day of, 19.., at o'clock in the

noon, the application of for the appointment of a receiver [and for warrant of seizure to issue] herein came on for hearing upon [with-out] notice to the bankrupt, and it appearing by certificate of the District Clerk that the District Judge is absent from said District and that said applications have been referred to the referee on account thereof; and the same having been duly heard upon the evidence, at the hearing whereof said bankrupt was represented ["notice upon said bankrupt having, for good cause shown, been dispensed with"] now it is found that the allegations of said applications are true, and that a petition for adjudication was on the day of, 19.., filed against of the city of in said District, and that said petition is still pending [and that an act of bankruptcy has been committed as therein set forth (or) that said bankrupt has neglected and is neglecting and is about to further neglect his property, so that the same has deteriorated and will further deteriorate in value, see Bankr. Act § 69], and that it is absolutely necessary for the preservation of the estate of said bankrupt that a receiver be appointed to [seize and] take charge of said bankrupt's estate, and a bond in the sum of \$. having been filed as provided in Section 3 (e) of the Bankruptcy Act of 1898.

Now, it is ordered that said applications be and they hereby are granted; that said bond be and it hereby is approved both as to its form and amount; that Esq. of, be and he hereby is appointed receiver of the estate of said bankrupt and upon filing an additional bond as receiver in the sum of \$., with sufficient sureties to be approved by this court, that said receiver [seize upon and] take charge of all the assets of the bankrupt and preserve the same pending the election and qualification of the trustee herein or until the dismissal of the petition; and it is further ordered that said receiver forthwith prepare and file an inventory of the assets coming into his possession; [and it is further ordered that, ... and of, three disinterested persons, be and they are hereby appointed appraisers to appraise the property said to belong to the estate of the bankrupt and report their appraisal to the court, said appraisal to be made as soon as may be and the appraisers to be duly sworn.]

[UNOFFICIAL FORM NO. 15.]

Order Appointing Receiver [in Involuntary Bankruptcy without Warrant of Seizure.]

Upon this day of, 19.., at .. o'clock in the noon, the application of for the appointment of a receiver herein, came on for hearing with [or without] notice to the bankrupt; [if before the referee, add "and it appearing by certificate of the District Clerk that the District Judge is absent from [the Division of] said District, and that said application has been referred to this Referee on

account thereof"] and the same having been duly heard upon the evidence, at the hearing whereof [no adverse interest was represented] [or, if without notice, that good cause was shown for dispensing with notice upon said bankrupt] said bankrupt was present [or "not present though duly notified"], now, it is found that the allegations thereof are true, and that a petition for adjudication was on the day of, 19.., filed against of the city of, in said District and that said petition is still pending and that it is absolutely necessary for the preservation of the estate of said bankrupt that a receiver be appointed to take charge of said estate.

It is therefore ordered that said application be and it hereby is granted; and Esq., of be and he hereby is appointed receiver of the estate of said bankrupt; and that, upon filing a bond as receiver in the sum of \$...... with sufficient sureties to be approved by this Court, such receiver take charge of all the assets of the bankrupt and preserve the same pending the election and qualification of a trustee herein or until the dismissal of the petition; and it is further ordered that said receiver take an immediate inventory of the assets of the bankrupt.

[UNOFFICIAL FORM No. 16.]

Order Appointing Receiver [Voluntary Bankruptcy] [No Order to Continue Business.]

Upon this day of, 19.., at o'clock in the noon, the motion [petition] of, bankrupt [or creditor] for the appointment of a receiver came on for hearing, without notice, [or, if notice were given, so state] at which hearing no adverse interest was represented, and the same having been duly considered upon said motion [petition] and the evidence, now it is found that the allegations of said motion [petition] are true and that it is absolutely necessary for the preservation of the estate that a receiver be appointed to take charge of the same until a trustee is appointed and qualified.

And it is therefore ordered that Esq., be and he hereby is appointed receiver herein, and upon his giving bond in the sum of \$...... with good and sufficient sureties to the satisfaction of the Court, it is ordered that he take charge of all the assets of the bankrupt and preserve the same pending the election and qualification of a trustee herein.

And it is further ordered that said receiver forthwith prepare and file an inventory of the assets so coming into his possession.

[UNOFFICIAL FORM No. 17.]

Order Refusing Application for the Appointment of a Receiver.

Upon this day of, 19.., the application of

for the appointment of a receiver came on for hearing, [of which hearing due notice was given, or, no notice was given; or, at which hearing no adverse interest was represented; or upon due notice to] and the same having been considered upon said application and the evidence, now it appears that it is not absolutely necessary for the preservation of the estate that a receiver be appointed, and it is therefore ordered that said application be and it hereby is refused.

[UNOFFICIAL FORM NO. 18.]

Order Appointing Receiver, [Voluntary Bankruptcy] with Order to Continue Business.

Upon this day of, 19.., at .. o'clock in the noon, the bankrupt's application [or, "the application of , a creditor" (or "an interested party")] for the appointment of a receiver [and for leave to conduct the business for a limited period] came on for hearing [without notice to creditors], and the same having been duly considered upon said application and the evidence, now it is found that the allegations of said application are true and that it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of the same, [and that it is for the best interests of said estate that said receiver be authorized to continue the business for a limited period].

And, it is therefore ordered that said application be and it hereby is granted and , Esq., of in said District be and he is hereby appointed receiver of the estate of said bankrupt; and that, on filing a bond in the sum of dollars [\$.....] to be approved by this Court, said receiver take possession of the assets of said estate [and continue the business of said bankrupt (to the extent of completing the work now on hand)], and so to do until the appointment and qualification of a trustee herein [or "until the day of, 19..," or "until the further order of the Court."]

[UNOFFICIAL FORM NO. 19.]

Affidavit for Arrest and Detention of Bankrupt.

United States District Court for the District of
In Bankruptcy.

....., ..., and	}
....., Petitioning Creditors	
v.	
....., Alleged Bankrupt.	
[or, if the petition be voluntary]	
In the Matter of	}
....., Bankrupt.	

United States of America;
 District of;
 State of;
 County of, ss;

.....being duly sworn deposes and says that [here set up the facts showing the pendency of the bankruptcy proceedings and the residence of the bankrupt within the district, or that his principal place of business is in the district, and in detail the facts showing that the bankrupt is about to leave the district in which he resides or has his principal place of business, to avoid examination, and that his departure will defeat the proceedings in bankruptcy, concluding with the general averment] and that said [alleged] bankrupt is about to leave the district in which he resides [or has his principal place of business] to avoid examination, and his departure will defeat the proceedings in bankruptcy herein.

Sworn to before me this

day of, 19..

.....

[UNOFFICIAL FORM NO. 20.]

Warrant for Arrest and Detention of Bankrupt.

United States District Court for the District of

In Bankruptcy.

....., and	}
....., Petitioning Creditors	
v.	}
....., Alleged Bankrupt.	
[or, if the petition be voluntary]	}
In the Matter of	
....., Bankrupt.	

To the Marshal of the Said District or to Either of His Deputies, Greeting:

Whereas, a petition for adjudication of bankruptcy was on the day of, A. D. 19.., filed against of the County of and City of in said district, and the same is still pending [or, if after adjudication, "Whereas, the above named was duly adjudged bankrupt by this court on the ... day of, 19.., and thirty days after the appointment of a trustee herein have not yet expired,"] and

Whereas, it appears to the satisfaction of the judge, by the affidavits of and, that, the [alleged] bankrupt herein, is about to leave this district wherein he resides [or has his principal place of business] to avoid examination and that his departure will defeat the proceedings in bankruptcy;

You are therefore authorized and required to take into your custody,

the said, the [alleged] bankrupt herein, and bring him forthwith before the court for examination;

Witness the Hon., Judge of the said Court and the Seal thereof at in said District, on the day of, A. D. 19...

.....,
Clerk.

[UNOFFICIAL FORM No. 21.]

Order upon Return of Warrant of Arrest.

United States District Court for the District of
In Bankruptcy.

....., ..., and	}
....., Petitioning Creditors	
v.	
....., [Alleged] Bankrupt.	
[or, if the petition be voluntary]	
In the Matter of	
....., Bankrupt.	

It appearing to the satisfaction of the court [or "of the judge"] that heretofore to wit, on the day of, 19.., a petition for the adjudication of as a bankrupt, was duly filed herein, which petition is still pending [or, if after adjudication then "that heretofore, to wit, on the day of, 19.., the above named was, by the consideration of this court (or, of the United States District Court for the District of) duly adjudged bankrupt and that thirty days after the appointment of a trustee herein have not yet expired"] and that upon the affidavits of two witnesses, to wit, ... and, a warrant was, upon the day of, 19.., duly issued to the marshal of this district, commanding him to arrest and bring forthwith before this court, the [alleged] bankrupt, for examination; and that in pursuance of said order, said has been duly brought before the court for examination;

And now due hearing thereof having been had and it appearing that the allegations of said affidavits are true, and that said [alleged] bankrupt was, at the time of his arrest, about to leave this district in which he resides [or has his principal place of business] to avoid examination, and that his departure would defeat the proceedings in bankruptcy, now, it is

Ordered that the Marshal keep said bankrupt in his custody not exceeding ten days, but without imprisoning him, and that he so keep him in custody until he shall be examined and released or give bail conditioned for his appearance for examination from time to time, not exceed-

ing, in all, ten days, and for his obedience to all lawful orders made in reference thereto.

.....
United States District Judge.

[UNOFFICIAL FORM NO. 22.]

Receiver's Petition for Leave to Institute Ancillary Proceedings in Another District before Adjudication of Bankruptcy.

United States District Court for the District of

In Bankruptcy.

....., ..., and	}
....., Petitioning Creditors	
v.	
....., Alleged Bankrupt.	
[or if the petition be voluntary]	
In the Matter of	}
....., Bankrupt	

To the Hon., Judge of the United States District Court:

Your petitioner, ... as receiver in bankruptcy of
....., appearing by his attorney, respectfully represents that:

1. On the day of 191..., an involuntary petition in bankruptcy was filed against the said [alleged] bankrupt herein, [or, a voluntary petition was filed by upon which adjudication has not yet been had, having been stayed by order of court] which petition is still pending; and thereafter such proceedings were had as that your petitioner was appointed receiver of the said bankrupt's estate and effects and he is now the duly qualified and acting receiver thereof.

2. [Here set forth the necessity for the institution of ancillary proceedings in his aid as, that the bankrupt or certain witnesses being or residing outside the jurisdiction of the original court and within the jurisdiction of the ancillary court are to be examined under Section 21-A, or that summary orders for surrender of assets are to be asked for against the bankrupt, or other person within the jurisdiction of the ancillary court, or that liens are to be marshalled upon the property of the bankrupt estate located within the jurisdiction of the ancillary court, etc., etc.]

Wherefore, your petitioner prays for an order authorizing him to institute ancillary proceedings in bankruptcy in the United States District Court for the District of, for the purpose of obtaining possession of the books, papers and documents, and other property belonging to the bankrupt estate, located in said district, and for

the purpose of examining witnesses whose testimony may be found to be of probable pertinency to the acts, conduct and property of the [alleged] bankrupt, and for such other and further aid as said receiver may be entitled to.

.....
Receiver in Bankruptcy of

[Verification]

[UNOFFICIAL FORM NO. 23.]

Trustee's Petition for Leave to Institute Ancillary Proceedings in Another District after Adjudication of Bankruptcy.

United States District Court for the District of

In Bankruptcy.

In the Matter of
, Bankrupt. }

To the Hon., Judge of the United States District Court:

Your petitioner, ... Trustee in Bankruptcy of
, the above named bankrupt, appearing by his attorney, respectfully represents that:

1. On the day of 191.., by the consideration of this court, the above named [add, if so, "a corporation of the State of"] was duly adjudged bankrupt upon an involuntary petition filed against him [it] on the day of, 191.. [or, if so, "upon his voluntary petition"] and thereupon the administration of the estate of said bankrupt was duly referred to Esq., as Referee in Bankruptcy of this court; and thereafter such proceedings were had as that your petitioner, ..., was duly appointed trustee of the bankrupt's estate and effects, whereupon your petitioner duly qualified and has ever since been acting as such trustee;

2. [Here insert a brief statement of facts showing the propriety of ancillary proceedings, as, that the bankrupt or certain witnesses being or residing outside the district of the court of original jurisdiction and within the jurisdiction of the court of ancillary jurisdiction, are to be examined under Section 21-A, or that summary proceedings for the surrender of assets or for other purposes are to be instituted against the bankrupt or other person over whom summary jurisdiction could be exercised, or that liens are to be marshalled upon the property of the bankrupt's estate lying within the jurisdiction of the court of ancillary jurisdiction, etc., etc.]

3. It is therefore necessary that ancillary proceedings be instituted in the District of in aid of your petitioner as

trustee of said bankrupt [for the purpose of the examination of witnesses concerning the acts, conduct and property of the bankrupt and for the obtaining of assets belonging to the bankrupt estate, etc., etc., as the case may be].

Wherefore, your petitioner as trustee of bankrupt, respectfully prays the court for an order authorizing him to institute ancillary bankruptcy proceedings in the United States District Court for the District of, in aid of him as trustee.

.....,
Trustee in Bankruptcy of
.....

[Verification]

[UNOFFICIAL FORM NO. 24.]

Order Authorizing Receiver or Trustee to Institute Ancillary Proceedings in Another District.

United States District Court for the District of
In Bankruptcy.

....., ... and	}
....., Petitioning Creditors	
<i>v.</i>	
....., Alleged Bankrupt.	
[or in cases of voluntary bankruptcy or after adjudication]	
In the Matter of	}
....., Bankrupt	

The petition of as trustee [or receiver] in bankruptcy of bankrupt, [or alleged bankrupt] herein, having come on for hearing, and it appearing that the petitioner therein, has been duly appointed and has qualified as trustee [or receiver] and that it is proper and necessary in his aid that ancillary proceedings be instituted and had in the district of;

Now, upon motion of, Esq., attorney for said petitioner, it is

Ordered that said petition be and it hereby is granted, and said the petitioner, as trustee [or receiver] is authorized and directed to apply for the institution of ancillary bankruptcy proceedings in the district of

.....,
United States District Judge.

[UNOFFICIAL FORM No. 25.]

Petition in the Court of Ancillary Jurisdiction for the Institution of Ancillary Proceedings before Adjudication.

United States District Court for the District of

In Bankruptcy.

....., ..., and, Petitioning Creditors, v., [Alleged] Bankrupt.	}	Petition for Ancillary Bankruptcy.
--	---	---------------------------------------

To the Hon., Judge of the United States District Court for the District of

Your petitioner, ... Receiver in Bankruptcy in the above entitled proceedings, appearing by his attorney, respectfully represents that:

1. On the day of, 191.., the above named, ... and, as petitioning creditors, filed their petition in involuntary bankruptcy in the United States District Court for the District of, for the adjudication of as a bankrupt, which petition is still pending;

2. Thereafter, to wit, on the day of 191.., your petitioner, ..., was duly appointed by said United States District Court for the District of, receiver of the assets of said alleged bankrupt; and your petitioner thereupon duly qualified and is still acting as receiver therein:

3. [Here state the facts that would warrant the institution of ancillary proceedings, as, for instance, the existence of assets in the ancillary district, which the receiver wishes to obtain possession of, the presence of witnesses or books and documents to be examined, etc., etc., with such particularity as the facts require.]

4. For the above facts it is necessary that ancillary proceedings be instituted in this District of in aid of your petitioner as receiver. [Add if so, "and it is absolutely necessary for the preservation of the estate that an ancillary receiver be appointed."]

5. By order of the said United States District Court for the District of, duly made upon the day of, 191.., your petitioner was authorized to apply for the institution of ancillary proceedings in his aid in this United States District Court for the District of

Wherefore, your petitioner, as receiver of the assets of, alleged bankrupt herein, respectfully prays the court for an order of ancillary pro-

.....,
Petitioner.

[UNOFFICIAL FORM No. 26.]

Petition in the Court of Ancillary Jurisdiction for Institution of Ancillary Proceedings, after Adjudication.

United States District Court for the District of
In Bankruptcy.

In the Matter of	}	Petition for
....., Bankrupt	}	Ancillary Bankruptcy.

To the Honorable Judge of the United States District Court
for the District of

Your petitioner, ... trustee in bankruptcy of ,
appearing by , his attorney, respectfully represents that:

1. On the day of, 191., by the consideration of the United States District Court for the district of, sitting in bankruptcy, the above named was duly adjudicated bankrupt herein on an involuntary petition filed against him [or upon a voluntary petition filed by him] on the day of 191.; and thereupon the administration of the estate of said bankrupt was duly referred to Esq. Referee in Bankruptcy, and thereafter, such proceedings were had as that your petitioner was duly appointed trustee of the bankrupt's estate and effects, whereupon your petitioner qualified and has ever since been acting as such trustee.

2. [Here state the facts that would warrant the institution of ancillary proceedings, as, for instance, the existence of assets in the district, the presence of witnesses or books and papers to be examined, etc., etc. with such particularity as would be requisite in the premises.]

3. For the above facts it is necessary that ancillary proceedings be instituted in this district of in aid of your petitioner as trustee of said bankrupt for the purpose of the examination of witnesses relative to the acts, conduct and property of the bankrupt and for the obtaining of possession of assets belonging to the bankrupt estate [state additional reasons, if any].

4. Your petitioner, as trustee of has been duly authorized by the bankruptcy court of original jurisdiction to apply for ancillary proceedings in his aid in this United States District Court for the District of

Wherefore your petitioner, as trustee of, bankrupt, respectfully prays the court for an order of ancillary proceedings herein in aid of him as trustee; that these proceedings may be referred to a referee of this court with full authority to take such proceedings for the examination of witnesses and the production of books, papers, and documents, and for the obtaining of possession of property belonging to said trustee as may be proper in aid of said trustee in accordance with law.

.....,
Petitioner.

[Verification]

[UNOFFICIAL FORM NO. 27.]

Order Instituting Ancillary Proceedings in the Court of Ancillary Jurisdiction, before Adjudication.

United States District Court for the District of

In Bankruptcy.

....., and
Petitioning Creditors,
v.
....., Alleged Bankrupt.

}

Upon this day of, 191, the petition of, as receiver in bankruptcy of, alleged bankrupt, having come on for hearing, and it appearing that an involuntary petition in bankruptcy has been filed and is now pending against, the above named alleged bankrupt, in the United States District Court for the District of; that said petitioner has been duly appointed by said court as receiver; that said receiver has been duly authorized to apply to this court for the institution of ancillary proceedings in this district, and that it is proper and necessary in aid of said receiver that ancillary proceedings be instituted herein [and that it is absolutely necessary for the preservation of the estate that an ancillary receiver be appointed herein.]

Now upon motion of, Esq., attorney for said petitioner, it is,

Ordered that the prayer of said petition be and it is hereby granted, and ancillary proceedings in aid of said, as receiver of said alleged bankrupt, are hereby instituted in this court, and it is,

[Further ordered that said, Esq., be and he hereby is ap-

pointed ancillary receiver herein, to qualify as such receiver by bond in the sum of dollars (\$....); and it is,]

Further ordered that said ancillary proceedings be and they hereby are referred to , Esq., a Referee in Bankruptcy of this court, to take such action and make such orders as may be proper.

.....
United States District Judge.

[UNOFFICIAL FORM No. 28.]

Order Instituting Ancillary Proceedings in the Court of Ancillary Jurisdiction, after Adjudication.

United States District Court for the District of
In Bankruptcy.

In the Matter of }
....., Bankrupt }

Upon this day of, 191..., the petition of , as trustee in bankruptcy of , bankrupt, having come on to be heard and it being shown to the satisfaction of the court that the above named has been duly adjudicated a bankrupt by the United States District Court for the District of, and that the administration of his estate has been referred to , Esq., as referee in bankruptcy; that the petitioner , is the duly appointed and qualified trustee of said bankrupt; and that it is proper and necessary in aid of said trustee that ancillary proceedings be instituted and had in this District Court of,

Now, upon motion of , Esq., attorney for said trustee, it is,

Ordered that the prayer of said petition be and it is hereby granted, and ancillary proceedings in aid of said , as trustee of said bankrupt, be and they are hereby instituted in this court, and it is,

Further ordered that said ancillary proceedings be and they hereby are referred to , Esq., a Referee in Bankruptcy of this court, to take such action and make such orders as may be proper.

.....
United States District Judge.

[UNOFFICIAL FORM No. 29.]

Adjudication in Involuntary Bankruptcy by Referee.

At, in said district, on this the day of, A. D., 19..., at .. o'clock in the noon, the petition of, ... and that said be adjudged a bankrupt within the true intent

and meaning of the Acts of Congress relating to Bankruptcy, having been filed with the Referee, together with the certificate of the Clerk of said Court that the Judge of said Court was absent from [the division of] said district on the next day after the last day on which pleadings might have been filed and that no pleadings have been filed by said bankrupt nor by any of his [its] creditors, and that said matter has been referred to this referee in accordance with law; and said petition having been heard and considered, now it is found that the allegations thereof are true, and it is therefore ordered that said petition be and it hereby is granted and the said is hereby declared and adjudged bankrupt accordingly.

[UNOFFICIAL FORM NO. 30.]

Adjudication by Referee on Answer Admitting Petition.

At, ..., in said District, on this day of, at o'clock in the noon the petition of of, that said be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy having been filed with the referee together with the answer of said respondent admitting to be true the allegations of said petition as to the act[s] of bankruptcy therein charged and the certificate of the District Clerk that the Judge of said Court was absent from said District upon the next day after the last day upon which adversary pleadings could be filed to said petition and that none were filed thereto, and that said matters have been referred to this referee on account thereof, now upon due consideration thereof it is ordered that the said petition be and it hereby is granted, and the said is declared and adjudged bankrupt accordingly.

[UNOFFICIAL FORM NO. 31.]

Order of Adjudication by Referee and Appointment of First Meeting.

Upon this, ... day of, A. D., 19.., at .. o'clock in the noon, the petition of of the city of in the county of and district aforesaid that he be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been filed with the referee, together with his schedules and the certificate of the Clerk that the Judge of said Court is absent [from the District] [or is unable to act] and that this matter has been referred to the referee in consequence thereof; and said petition having been heard and duly considered, the said is hereby declared and adjudged bankrupt accordingly; and it is ordered that the first meeting of creditors be held at the offices of the Referee at in the city of upon the day of, A. D., 19.., at o'clock in the noon, at which meeting said bankrupt is hereby ordered to attend, in compliance with law.

[UNOFFICIAL FORM NO. 32.]

Order for Bankrupt to Prepare Schedules.

It appearing that the bankrupt has failed [or bankrupt's officers have failed] within ten days time from the date of adjudication to file the list of the creditors and the schedule of the assets of the bankrupt [corporation] herein required by law to be filed now it is ordered that within five days from and after this date, said bankrupt [or , officer of said bankrupt corporation] prepare and file a list of the creditors of said bankrupt with their names and addresses and a schedule of the assets of said bankrupt, in accordance with law.

And it is further ordered that service of this order by copy be made upon said bankrupt [said] returnable five days before the said day of , 19..

[UNOFFICIAL FORM NO. 33.]

Order Appointing First Meeting, Adjudication Having Already Been Made by Judge.

The petition, schedules and certified copy of the order of reference and adjudication under the above bankruptcy having been filed, now, upon this day of , 19.., it is ordered that the first meeting of creditors of who was heretofore, to-wit: upon the day of by the Court of Bankruptcy of said District duly adjudged bankrupt, be held at the offices of the Referee, at in the city of upon the day of , 19.., at .. o'clock in the noon, at which meeting it is ordered that said bankrupt attend [with all his books and papers] in accordance with law.

[UNOFFICIAL FORM NO. 34.]

Certificate of Notice to Creditors.

I hereby certify that I did upon the day of , 19.., mail printed notices [of the form herein filed] of the [first meeting of creditors under the above bankruptcy], [hearing upon the bankrupt's petition for discharge], enclosed within return and penalty envelopes, addressed to the names and addresses given in the bankrupt's schedules, or as notified by creditors; and I further certify that I did on said day likewise mail to the newspaper a notice thereof for publication therein.

.....,
Referee in Bankruptcy.

Dated , 191..

[UNOFFICIAL FORM NO. 35.]

Certificate of First Meeting and Orders Made Thereat [no creditors.]

This being the day appointed by the Court for the first meeting of creditors in the above bankruptcy, of which meeting due notice was given by publication in the, and by mail, I, the Referee of said Court in charge of said Bankruptcy do hereby certify that I sat at the time and place mentioned in said notices and ordered by the Court, to-wit: at . . . in the city of upon the . . . day of, A. D., 19.., at .. o'clock in the noon, to take the proofs of debts and for the choice of trustee, the examination of the bankrupt and other proper business; and I certify that no creditor whose claim was allowed appeared at said meeting; but it appearing nevertheless to be for the best interest of the estate that a trustee thereof be appointed, it is ordered that of be and he is hereby appointed trustee of said bankrupt's estate and his bond is fixed in the sum of dollars, [or it appearing that no claims have been filed against said estate and that no assets exist belonging thereto, exempt or otherwise, and that the appointment of a trustee is at this time unnecessary, now, it is ordered that the election of a trustee be and it hereby is dispensed with] and said first meeting is thereupon adjourned without day.

[UNOFFICIAL FORM NO. 36.]

Certificate of First Meeting and Orders Made Thereat [Creditors Present or Claims Filed.]

This being the day appointed by the Court for the First Meeting of the Creditors under the above bankruptcy, of which meeting due notice was given by publication in the and by ten days notice by mail, I, the referee of said Court in charge of said Bankruptcy do hereby certify that I sat at the time and place mentioned in said notices and ordered by the Court, to-wit: at in the city of upon the . . . day of, 19.., at .. o'clock in the noon, to take the proofs of debt and for the choice of trustee, the examination of the bankrupt and other proper business; and I certify that the following is a list of creditors whose claims were proved at said first meeting, together with the amounts for which the same were respectively made, to-wit:

.

 and said foregoing claims having been thus filed and proved and having been duly examined and found correct, now upon the several motions of said respective claimants, it is ordered that the said claims be and they hereby are severally allowed and for the sums named, save and except

that the following of the said claims are not allowed and are postponed for cause, to-wit:

And I further certify that the following is a list of all creditors present at said first meeting whose claims have been allowed, to-wit:

And I further certify that the majority in number and amount of the creditors who have proved their claims and who were present or represented by duly authorized agents or attorneys, made choice of, Esq., of in said District to be trustee of said bankrupt's estate and effects and fixed his bond in the sum of \$....., and it appearing that said Esq. is a suitable person for said trust, now, it is ordered that said appointment be and the same hereby is approved; and it is further ordered that said first meeting be adjourned [without day; or, for the examination of the bankrupt] to the day of, 19.., at o'clock in the noon.

[UNOFFICIAL FORM No. 37.]

Order Allowing Withdrawal of Notes.

[Part of certificate of first meeting of creditors.]

Upon application of and it is ordered that said claimants be and they are hereby authorized to withdraw the original notes attached to their proofs of claim and to substitute copies in place thereof.

[UNOFFICIAL FORM No. 38.]

Order Determining Value of Securities for Purpose of Participation in Meetings.

[Part of certificate of first meeting of creditors.]

At said meeting of creditors, the secured claim of was presented for allowance and the same having been examined and evidence taken to determine the value of securities for the purpose of participation in creditor's meetings prior to the final determination of the value of the same, now, it is found that said claim is correct and duly proved and that the value of said securities seems to be \$..... and that there seems to be owing the sum of dollars over and above the value of said securities; and it is therefore ordered that said claim be and it hereby is allowed for the purpose of participation in the meetings of creditors prior to the final determination of the value of said securities, in the sum of \$.....

[UNOFFICIAL FORM NO. 39.]

Order Allowing General Claims.

Upon the day of, A. D., 19.., at .. o'clock in the noon, the following claims were presented for allowance and the same having been examined and found correct and duly proved, now, it is ordered that said claims be and the same hereby are allowed, in the respective sums set opposite the several names, as follows, to-wit:

.....\$.
\$.

[UNOFFICIAL FORM NO. 40.]

Order Allowing Priority Claim.

Upon this day of 19.., the claim of and his motion for allowance of it as a priority claim were presented; and the same having been duly considered, now it is found that said claim is correct in amount and duly proved, and that the same is for wages earned within three months preceding the filing of the petition, in the capacity of workman [clerk] [servant] ["traveling" or "city" salesman] of the bankrupt, and as such is entitled to priority.

And it is therefore ordered that said claim be and it hereby is allowed as a priority claim against the estate in the sum of \$.; and that the same be paid [forthwith or] before the payment of any general creditors herein.

[UNOFFICIAL FORM NO. 41.]

Order of Subrogation on Assignment of Claim Already Proved.

Upon this day of, 19.., at .. o'clock in the noon, upon application of, and it appearing that upon the day of proof of the assignment to of the claim of heretofore approved and entered on the referee's docket as follows was filed and ten days due notice thereof was given by mail to said of the filing of said proof of assignment, and that no objection has been entered herein, and no request for further time been made, and that said proof of the assignment of said claim is satisfactory, now it is ordered that said be and he hereby is subrogated to the original claimant, as owner of said claim.

[UNOFFICIAL FORM NO. 42.]

Order Approving Receiver's [or Trustee's] Bond.

Upon this day of, 19.., it appearing to the court that of, has been duly appointed trustee [or receiver] of the

estate of the above named bankrupt and has given a bond with
 as surety for the faithful performance of his official duties in the
 amount fixed by the creditors [order of the Court], to-wit: in the sum of
 dollars, and said surety being satisfactory to the court, now it is
 ordered that said bond be and the same is hereby approved.

[UNOFFICIAL FORM No. 43.]

Order for Examination of Witness.

Upon application of , it is ordered that
 be and appear before the referee at his office No. , in the
 city of , upon the day of , 19.., at o'clock in the
noon, to be examined concerning the acts, conduct and property of
 the bankrupt; and that due service of this order by copy be made upon said
 , the same to be returnable on the day of , 19...

[UNOFFICIAL FORM No. 44.]

Order of Adjournment.

Upon application of the [or, by consent of parties] it is
 ordered that the hearing upon be and the same hereby is
 adjourned to the ... day of , A. D. 19.., at o'clock in the
noon.

[UNOFFICIAL FORM No. 45.]

Order Appointing Appraisers.

Upon this day of , 19.., upon application of the trustee [or,
 "of the receiver" or "of "] it is ordered that ,
 and , of , three disinterested persons be and they are hereby
 appointed appraisers to appraise the [real and personal] property belonging
 to the estate of the bankrupt [set out in the schedules now on file in this
 court and such other property as may be pointed out to them for appraisal]
 and report their appraisal to the Court, said appraisal to be made as soon
 as may be, and the appraisers to be duly sworn.

[UNOFFICIAL FORM No. 46.]

Order Allowing Appraisers' Fees.

Upon this day of , 19.., upon application of the trustee and
 for good cause shown, it appearing that special circumstances exist making
 the ordinary allowance to appraisers for their services inadequate and that

reasonable compensation therefor would be the sum of dollars each, now, it is ordered that heretofore by order of the Court appointed appraisers herein, be and they hereby are allowed said sum of \$....., each as and for their reasonable compensation as such appraisers.

[UNOFFICIAL FORM NO. 47.]

Order of Substitution of Trustee for Receiver.

Upon application of the trustee it is ordered that the trustee be and he hereby is substituted for the receiver in the receiver's petition to [sell] filed herein.

[UNOFFICIAL FORM NO. 48.]

Trustee's Petition to Marshal Liens and for Sale of Property Free from Liens, etc.

United States District Court for the District of
..... Division.

In Bankruptcy.

In the matter of
..... Bankrupt.
..... as trustee of
....., plaintiff,
v.
....., defendant.

} Trustee's Petition to Marshal Liens
and for Sale of Property Free from
Liens, etc.

..... is the duly appointed, qualified and acting trustee in bankruptcy of the bankrupt herein [or set forth in detail the facts and dates of adjudication of bankruptcy, appointment of trustee, etc., etc.]; and as such has in his possession [control] the following described property:

....., ... and, claim to have interests in said property by way of lien or otherwise [the validity and priority of which said trustee denies]; and said claims right of possession of a portion of said property, to-wit:

[Said is the wife of the bankrupt and as such has an inchoate dower interest in the premises; she is of the age of years, and the bankrupt is of the age of years; and the said consents to the sale of said property free of her inchoate dower interest, the commuted value thereof to be paid to her in lieu of her said interest.]

It is for the best interests of the estate that the said property be sold at

private sale [public auction] free and clear of all incumbrances [subject to encumbrances.]

The appraised value thereof is \$.

Wherefore as such trustee prays the court for an order marshaling the liens upon and interests in said property, determining the validity, amount and priority thereof, ordering its sale at public auction or private sale as the court may direct, free and clear of all encumbrances and interests and transferring the rights of the parties to the fund derived from said sale, and further prays for an order to show cause upon the several parties defendants herein requiring them to set up their rights or be forever debarred from asserting the same; and for such other and further relief as in equity is just.

[Verification]

[UNOFFICIAL FORM NO. 49.]

Answer of Lienholder to Trustee's Petition to Marshal Liens and Sell.

United States District Court for the District of
In Bankruptcy.

In the matter of Bankrupt. as trustee of , plaintiff v. defendant	} Answer of Lienholder to Trustee's Petition to Marshal Liens and Sell.
--	--

. , defendant in the above entitled proceedings to sell, has a lien upon a portion of the property in said petition described, to-wit
.
by reason of the following facts, to-wit:

On or about, etc. [here set up facts constituting lien].

Wherefore, he prays the court for an order finding the validity, extent and priority of his said lien and directing the sale of said premises free and clear of all liens and the transfer of his lien to the proceeds therefrom; and for such other and further relief as is just.

[Verification]

[UNOFFICIAL FORM NO. 50.]

Answer of Bankrupt's Wife Consenting to Sale Free of Her Inchoate Dower.

United States District Court for the District of

In Bankruptcy.

In the matter of
Bankrupt.
as trustee
plaintiff
 v.
defendant

} Answer of Bankrupt's Wife Consenting to Sale Free of Her Inchoate Dower.

..... the above named defendant, is the wife of the bankrupt and is of the age of years, said bankrupt being of the age of years. As such wife she is entitled to an inchoate dower interest in the property in said petition described [or in the following portion of the property in said petition described, to-wit:]

She consents that said premises may be sold free and clear of her inchoate dower interest and that her interest may be transferred to the proceeds derived from said sale, and that out of said proceeds [of said portion of said property] there be paid to her the commuted value of her said inchoate dower interest.

[Verification]

[UNOFFICIAL FORM NO. 51.]

Order Appointing Hearing upon Petition to Sell.

Upon application of the trustee, it is ordered that the hearing upon his petition to sell at public or private sale be held before the referee, at his offices..... in the city of upon the day of, 19.., at o'clock in the noon; and that ten days notice thereof be mailed to all creditors to the names and addresses given in the bankrupt's schedules.

[UNOFFICIAL FORM No. 52.]

**Notice or Order to Show Cause on Trustee's Petition to Marshal
Liens and Sell.**

United States District Court for the District of

In Bankruptcy.

In the matter of, Bankrupt.	} Notice or Order to Show Cause on Trustee's Petition to Marshal Liens and Sell.
--------------------------------------	--

To

You are hereby notified that the petition of, trustee of the estate of, above named bankrupt, has been filed, praying the court for an order to sell, free from liens and interests, certain property in the custody of said court, in which property you are said to claim an interest by way of lien or otherwise and for an order marshaling said liens and interests and determining their validity, extent and priority; and that therefore it is ordered that you shall answer and set up your claims as to the said property or be forever debarred from asserting the same, before, Esq., Referee of said Court in Bankruptcy, at the referee's office, in the city of, on or before the day of, 19.., at o'clock in the noon, and at said time and place show cause, if any you have, why such orders should not be granted and such action taken.

Witness, the undersigned Referee of said Court, in Bankruptcy, at said city, of, in said District, this day of, A. D. 19...

.....,
Referee in Bankruptcy.

[Certificate of District Clerk to signature and official capacity of referee.]

[UNOFFICIAL FORM No. 53.]

Order Marshalling Liens and for Sale Free and Clear of Incumbrances.

Upon this day of, 19.., the trustee's petition to marshal liens and sell property free and clear of all encumbrances, came on [by adjournment from time to time from the day of, 19..] for hearing, of the [original] hearing of which ten days due notice by mail was given to all creditors; and of which petition due service of notice, by rule to show cause, was made upon the following named parties, defendants herein; to-wit:
[and to which petition the following parties waived service of process and

voluntarily entered their appearance, to-wit:] and to which petition the following parties filed answer [or answer and cross-petition]; the trustee filing also the following pleadings, to-wit and the said filing answer [or reply, etc.] to the cross petition [or answer] of; and to which cross petition [or answer] said is in default of answer [or reply] and thereby confesses the allegations of said cross-petition [or answer] to be true;

And the same having been duly considered upon said pleadings and the evidence, now it is found that the property in said trustee's petition described is in the possession [or, control] of the trustee; that the defendant has a good and valid lien upon said property in the sum of \$. from the day of, 19.., by virtue of his mortgage set up in his cross-petition herein and that the same is the first and best lien thereon after payment of costs and taxes; [that the title and right of possession of part of said property in said petition described, to-wit: is [not] in the cross-petitioner]; [that the defendant is the wife of the bankrupt; that at the date of the adjudication herein her age was years and the bankrupt's age years; and that she is entitled to inchoate dower in the premises described in said petition or in the following portion of the property in said petition described to-wit]; that the cross petitioner has a good and valid lien upon said property [upon a part of said property, to-wit:] and that the said lien of is the next best lien upon said premises, after payment of taxes and costs and of the said lien of;

And it is further found that it is for the best interests of the estate and of the parties that the said property be sold at a private sale [at public auction], free and clear of all encumbrances [subject to the following encumbrances and free and clear from the remainder] and that the rights of the parties be transferred to the funds derived from the sale thereof [and that the defendant wife of the bankrupt waives her inchoate dower interest herein and consents to the sale of said premises, free and clear therefrom, conditioned on the payment to her of the commuted value of her inchoate interest therein; and that her commuted dower interest therein is one th part of the proceeds, etc.]

And it is therefore ordered that the prayer of said petition be and it hereby is granted; and said trustee is directed to sell free and clear of all encumbrances, at private sale, upon the premises [or if at public auction and if the property be real estate, then upon the premises or at the front door of the Court house of the county wherein the said property is situated, upon the day of, 19.., beginning at the hour in the noon, and that he give four weeks notice of the time and place of the sale thereof by advertisement in a newspaper of general circulation in

the said county [see, however, § 1939, *infra*] ; and that said sale be subject to the approval of the Court;

And further proceedings herein are adjourned to the day of at o'clock in the noon, for the consideration of the trustee's report of sale and for order of distribution hereunder.

[UNOFFICIAL FORM NO. 54.]

Order Confirming Sale and Directing Distribution.

Upon this day of, 19.., at o'clock in the noon by adjournment from the day of, 19.., the trustee's proceedings under the previous order of sale heretofore, to-wit on the day of, 19.., granted herein came on for approval of the trustee's report of his sale; and said report having been examined, and, it appearing therefrom that the trustee has sold the property in said petition described at private sale, free and clear of all encumbrances, to for the sum of \$....., and that said sale was in all respects regular and in accordance with said previous order of the Court, now it is ordered that said report be and it hereby is approved and said sale confirmed and said trustee is directed forthwith to execute and deliver to said purchaser a good and sufficient instrument of title to said property, upon receipt of said consideration;

And the Court coming on to distribute the proceeds of said sale in accordance with the previous order of the court marshalling the liens and interests and determining their validity, extent and priority, now it is ordered that the trustee pay out of the said proceeds in his hands

First, the costs of the proceedings herein, taxed as follows, to-wit: Referee's commissions \$....., referee's expenses \$.....: Trustee's commissions \$....., Trustee's expenses \$....., for abstract [or search of title] \$....., for appraisers \$....., for attorney's fees \$....., for advertising \$.....;

Second, the taxes herein \$.....;

Third, to in payment of his mortgage lien, \$.....;

Fourth, to to apply upon his mortgage lien, \$.....;

Fifth, to, the wife of the bankrupt's \$....., the commuted value of her inchoate dower interest;

Sixth, the remainder if any, said trustee to hold in his hands to await the further order of the Court.

[UNOFFICIAL FORM NO. 55.]

Order of Confirmation of Sale [general].

Upon the day of, 19.., at o'clock in the noon, the trustee's petition to sell came on, by adjournment, for hearing upon

the report of the trustee of sale, and said report having been examined and it appearing that said trustee has sold said property in said petition described, to-wit: for the sum of \$...... to and that said sale was in all respects regular and in accordance with the previous orders of the court and for the highest bid obtainable, now it is ordered that said report be and it hereby is approved and said sale confirmed and said trustee is directed forthwith to execute and deliver to said purchaser a good and sufficient instrument of title to said property upon payment to him of the consideration aforesaid.

[UNOFFICIAL FORM No. 56.]

Trustee's Bill of Sale.

Know all men by these presents, That, whereas on the day of, 19.., by the consideration of the District Court of the United States for the District of was duly adjudged bankrupt, and that,

Whereas, thereafter the undersigned, ... was duly appointed as trustee of his estate in bankruptcy, who thereupon duly qualified, and ever since has been and now is acting as such trustee; and that,

Whereas, thereafter, upon petition filed and notices given, an order of sale was duly made by said court, [by Esq., its referee in charge of said bankruptcy] authorizing the said trustee to sell [at private sale] public auction [for not less than three fourths the appraised value or for not less than \$......] the following property, such being [part of] the property in said petition described, to-wit:; and that,

Whereas, said as such trustee did, in pursuance of said order sell said property to at [private sale] public auction for the sum of \$......, such sum being not less than three fourths of the appraised value thereof [or being not less than said \$......], subject to all liens, [or free and clear from the liens and claims of the following parties, to-wit:]; and thereupon did report his sale thereof to the court; and that,

Whereas, upon due examination of said report and the proceedings thereunder the court found the same to be correct and in accordance with the previous order of the court, and thereupon upon the day of, 19.., duly confirmed the same.

Now therefore, I, the said trustee of the said, in bankruptcy, aforesaid, by virtue of said order of sale, and by virtue of said sale and the confirmation thereof, and of the statute in such cases made and provided, and of the powers vested in me, and for and in consideration of the premises and the sum of \$......, paid to me by the said, receipt whereof is hereby acknowledged, do hereby

grant, bargain, sell and convey to the said, his heirs and assigns forever, [all my right, title and interest as said trustee in] the following described property, to-wit:

To have and to hold said property to the said his heirs and assigns forever, as fully and completely as the said as such trustee in bankruptcy, by virtue of said order of sale and by virtue of said sale, and confirmation thereof, and of the statute made and provided for such cases, might or should sell and convey the same.

In witness whereof the said, as such trustee, has hereunto set his hand this .. day of, 19...

.
As Trustee of the Estate of
In Bankruptcy.

[UNOFFICIAL FORM No. 57.]

Part of Order of Declaration of a Dividend.

And it appearing that there will remain in the trustee's hands after the payment of all costs of administration, expenses and priority claims hereinbefore allowed and that probably will be hereafter allowed herein, a sum such that 50% thereof will be sufficient to pay a first dividend of% to general creditors whose claims have already been allowed and probably will hereinafter be allowed, now, it is ordered that a first dividend of% be and it hereby is declared payable to the following creditors, to-wit:

[UNOFFICIAL FORM No. 58.]

Order on Trustee for Failure to File Report.

It appearing that, Esq., the trustee herein has failed for months to file [or since the day of, 19..] to file a report of his proceedings, now, it is ordered that he prepare and file a report of his proceedings herein on or before the day of, A. D, 19..; and that due service of this order, by copy, be made upon him, returnable the day of, 19....

[UNOFFICIAL FORM No. 59.]

Order Approving Report of Exemptions.

Upon the day of, A. D., 19.., [at the (final) meeting of creditors of the above bankrupt, of which meeting ten days due notice by mail was given to all creditors], the trustee's report of property set apart by him to the bankrupt as exempt was presented for approval, and

the same having been examined and found correct and no exception having been filed thereto, now it is ordered that said report of exemptions be and it hereby is approved and said property therein described set apart to the bankrupt as exempt.

[UNOFFICIAL FORM No. 60.]

Order Appointing Final Meeting.

The trustee's report in the above bankruptcy having been filed. [or, it appearing that it is time for the estate to be closed], now it is ordered that the final meeting of creditors be held at the office of the Referee at in the city of upon the day of, A. D. 19.., at o'clock in the noon; [and it is further ordered that Esq., trustee herein, be and he hereby is required to prepare and file, before fifteen days set for said final meeting, a final report and final account of his proceedings herein; and it is ordered that due service of this order, by copy, be forthwith made upon said trustee returnable upon the day of, 19..].

[UNOFFICIAL FORM No. 61.]

Certificate of Final Meeting and Orders Closing Estate [no assets].

This being the day appointed by the Court for the final meeting of the creditors under the above bankruptcy, of which due notice has been given by mail to all creditors, I, the referee in charge of said bankruptcy, hereby certify that I sat at the time and place in the order of the Court and said notices designated, and that no creditors appeared at said final meeting and the final report and account of Esq., the trustee, having been examined and found correct and the same showing that the trustee has not discovered any assets belonging to said estate or made any disbursements in behalf thereof; now, [on motion of the trustee and] no adverse interest being represented, it is ordered that the said report and account be and the same are hereby approved and allowed; the said trustee discharged of his trust and said estate closed.

[UNOFFICIAL FORM No. 62.]

[For other composition forms, see official forms Nos. 60, 61, 62, 63, and unofficial forms Nos. 8 and 9.]

Certificate of Referee on Proposed Composition.

I, the undersigned referee in Bankruptcy, in charge of the above bankruptcy of hereby certify that a meeting of creditors was held upon the day of, A. D. 19.., at .. o'clock in the noon, at in the city of in said District, to consider an offer of com-

position to be proposed by the bankrupt thereat, of which meeting ten days notice by mail was duly given to all creditors:

And I further certify that before the offer of composition was made said bankrupt had duly filed the list of creditors and schedule of assets required by law to be filed and that heretofore, to-wit: at the first meeting of creditors in said bankruptcy held upon the day of, A. D., 19.., at .. o'clock in the noon, and in open court, said bankrupt had submitted himself to examination in accordance with law and was duly examined by creditors.

And I further certify that thereafter and upon the day of, 19.., at said meeting of creditors the bankrupt offered terms of composition to his creditors, as follows, to-wit: per cent. upon all unsecured debts not entitled to priority, all priority claims to be paid in full.

And I further certify that the claims of creditors allowed herein are as follows:

That of said claims the following have accepted in writing, which original acceptances are hereto attached, marked exhibit "a," said proposed composition to-wit:

and that thereby a majority in number and amount of creditors whose claims have been allowed have accepted in writing said offer of composition of per cent. upon all unsecured debts not entitled to priority;

And I further certify that the total number of unsecured creditors scheduled by the bankrupt herein in addition to the creditors whose claims have heretofore been allowed herein is and that the aggregate amount of the claims, including those allowed, is \$.....

And I certify that the following are the debts, and costs of administration entitled to priority herein:

And I finally certify that the bankrupt has deposited with the a designated depositary of this court the sum of \$..... and that said sum is sufficient to pay said % to all unsecured creditors whose claims have been allowed and in addition thereto, the same per cent. to all unsecured creditors whose claims have been filed and that have been scheduled by the bankrupt and not yet allowed and that said sum is sufficient also to pay the said priority claims and costs of administration herein.

[UNOFFICIAL FORM NO. 63.]

Certificate of Referee to Record.

I, the undersigned Referee in charge of the above bankruptcy hereby certify that the foregoing is a true and correct record of appearances, of papers filed, and of process issued in the proceedings in said bankruptcy before me.

Dated, 191..

[UNOFFICIAL FORM No. 64.]

Petition to Referee for Restraining Order or Stay of Suit.

United States District Court for the District of

In Bankruptcy.

In the matter of	}	Petition for Restraining Order [In-
....., Bankrupt.		junction] [Stay of Suit].

.....As Trustee

[Receiver] [Creditor before Appointment of Receiver or Trustee]

Plaintiff

v.

.....

Defendant

Plaintiff is the duly appointed, qualified and acting trustee [receiver] in the above entitled bankruptcy.

[Or, Plaintiff is a creditor of the above named bankrupt, and no receiver nor trustee has yet been appointed herein.]

Defendant is the bankrupt [or, is etc.]

Defendant is threatening to remove certain of the property belonging to the estate, to-wit:

.....and, unless restrained, will remove the same [or state other acts threatened.]

Defendant is plaintiff and bankrupt is defendant in a certain suit in replevin [or in a certain attachment suit] now pending, before of county, wherein certain of the property belonging to the estate has been seized; and the trial of the said suit [or sale under said attachment] will be had on the day of, unless sooner restrained.

[This plaintiff has applied to said court for a stay of said replevin suit until a trustee could be appointed who could intervene in behalf of the creditor in bankruptcy, but said court has refused to grant the same.]

[Or, said attachment was obtained within the four months preceding the adjudication of bankruptcy herein and at a time when the bankrupt was insolvent]; [and plaintiff has applied to said court for the surrender of said property—or plaintiff has applied to said court for a stay of said attachment suit but said court has refused to stay the same.]

Time is too short for the giving of notice, [or, to require the giving of notice would defeat the objects hereof for this that—here show facts indicating that the respondent would take action towards defeating the application if notice to him were required.]

Wherefore, plaintiff prays for a restraining order to issue upon defend-

And further prays that said restraining order be issued without notice upon said defendant [and as regards the attachment case “upon final hearing, the same be made a perpetual injunction”]; and finally, prays for such other and further relief as in equity is proper.

[UNOFFICIAL FORM No. 65.]

Wherefore, your petitioner prays the court for an order requiring said to surrender such property; and meanwhile prays that a rule to show cause may be issued upon said, requiring him to appear and answer

herein on or before a certain date to be fixed by the court, and for such other and further relief as may be just.

.....,
Trustee in Bankruptcy of

[Verification]

[UNOFFICIAL FORM No. 66.]

Order to Show Cause on Trustee's Petition for Summary Order.

United States District Court for the District of

In Bankruptcy.

In the matter of	}	Order to Show Cause on Trustee's
....., Bankrupt.		Petition for Summary Order.

Upon this day of, 19.., it appearing to the court that the trustee has filed in these proceedings his petition for a summary order upon the bankrupt [or bankrupt's agent or other person claimed to be without color of title] herein, requiring the said forthwith to surrender certain property claimed to belong to said estate and in his possession;

Now, it is ordered that the said be and he hereby is required to appear before the undersigned referee in charge of said bankruptcy, at said referee's office, ... in the town of, upon the day of, 19.., at o'clock in the noon to show cause if any he have, why such order should not be granted.

And it is further ordered that service of this order by copy be made upon said returnable on the day of, 19...

.....
Referee in Bankruptcy.

I, the undersigned referee in charge of the above bankruptcy hereby certify that the foregoing is a true and correct transcript from my record in the said proceedings.

In testimony whereof I hereto set my hand this day of, 19...

Referee in Bankruptcy.

[Certificate of the District Clerk, under seal, to the signature and official capacity of the referee.]

[UNOFFICIAL FORM NO. 67.]

Petition for Surrender or [Reclamation] from Trustee.

United States District Court for the District of
..... Division,

In Bankruptcy.

In the matter of } Petition of for Order of Sur-
....., Bankrupt. } render [or Reclamation].

..... is a corporation duly organized and existing under and by virtue of law, [or is a partnership, etc., etc.—alleging other capacity if any].

..... is the duly appointed, qualified and acting trustee [receiver] in bankruptcy of the estate of the above named bankrupt; and as such is in possession of the following described property, to-wit:
.....

Said is the property of this petitioner [or this petitioner has right of possession of said property] by virtue of [absolute ownership; or conditional sale wherein the condition has been broken and the title become absolute in the petitioner, etc., setting up parts showing claimant to be entitled to the possession of the property] and said is entitled to the immediate possession thereof.

Wherefore, said prays the Court for an order upon said as such trustee [or receiver] requiring him forthwith to surrender said property to this petitioner.

[Verification]

[UNOFFICIAL FORM NO. 68.]

Petition of Assignee [receiver] for Allowance of Lien upon Assets.

United States District Court for the District of
..... Division.

In Bankruptcy.

In the matter of } Petition of Assignee [Receiver] for
....., Bankrupt. } Allowance of Lien upon Assets.

On the day of, 19.., by the court of, ... County, ..., ... was duly appointed assignee [receiver] of the property [certain property] of, the above named bankrupt, and thereafter duly qualified as such; thereafter, to-wit, within four months from the date of said appointment, a petition in involuntary bankruptcy [a voluntary petition in bankruptcy] was filed against [by] the said and

thereafter the said was duly adjudged bankrupt herein. The said as assignee [receiver] as aforesaid, has surrendered the assets in his custody to the trustee in bankruptcy herein, and now is entitled to a lien thereon for his reasonable compensation and expenses for the care and preservation of the estate whilst the same was in his custody as such assignee [receiver] as follows, to-wit: [Here show expenses in detail and services performed]

Wherefore, said prays the Court for an order declaring the existence, extent and priority of his said lien upon the assets so surrendered by him and directing the payment of the same to him from the proceeds thereof.

[Verification]

[UNOFFICIAL FORM No. 69.]

Objections by Trustee to Claim.

United States District Court for the District of

In Bankruptcy.

In the matter of Bankrupt. } Objections to Claim of

..... is the duly appointed, qualified and acting trustee in the above bankruptcy, and as such objects to the allowance of the claim of heretofore filed herein, upon the following grounds, to-wit:

[Preference] Within the four months preceding the filing of the bankruptcy petition herein, to-wit, on or about the day of, 19.., the bankrupt, while insolvent, transferred to said who was then [and still is] a creditor, the following described property, to-wit:

Said transfer was made to apply upon a pre-existing debt owed by the bankrupt to said creditor; and the effect of the said transfer was to give said creditor a greater percentage of his claim than other creditors of the same class.

Said the creditor aforesaid, received said property with reasonable cause for believing that a preference would result to him thereby.

Said the creditor aforesaid has not surrendered said property so as aforesaid received by him.

[Payment] Upon said claim the following payments have been made in addition to those credited thereon by said creditor:

As Trustee in Bankruptcy.

[Verification]

[UNOFFICIAL FORM NO. 70.]

Petition for Reconsideration and Rejection of Claim.

United States District Court for the District of

In Bankruptcy.

In the matter of }
, Bankrupt. } Petition for Reconsideration and Re-
 rejection of Claim of

..... is the duly elected, qualified and acting trustee of the estate of the above named bankrupt.

Heretofore, to-wit, upon the day of, 19.., the claim of was allowed herein in the sum of \$.....

At the time of said allowance the trustee was not elected [or, the facts herein stated were not known to the trustee]; and good cause exists for the vacating of said order of allowance heretofore made herein.

Said claim should be expunged [disallowed; or reduced to the sum of \$.....] for the following facts, to-wit:

On or about the day of, 19.., a payment of \$..... was made on said claim, which was not credited in the said order of allowance herein.

Or, [here set up preference, fraudulent transfer, usury, want of capacity or—whatever defense there may be to the allowance of the claim].

[Verification]

[If positively sworn to it would seem, on principle, that the positive oath of the trustee should be sufficient to “overcome” the “prima facie case” made by the deposition for proof of claim itself. But see ante, §§ 843, 844 and 845].

[UNOFFICIAL FORM NO. 71.]

Petition to Compromise Controversy.

United States District Court for the District of

In Bankruptcy.

In the matter of }
, Bankrupt. } Petition to Compromise Controversy.

..... is the duly appointed, qualified and acting trustee of the estate of the above named bankrupt.

A controversy exists between said estate and a certain, the nature of which controversy is as follows:

Said controversy can be compromised upon the following terms, to-wit:

It is for the best interest of the estate that said compromise be effected

for the following facts, to-wit:

Wherefore said trustee prays the court for an order authorizing and approving such compromise.

[Verification]

[UNOFFICIAL FORM NO. 72.]

Petition for Leave to Abandon.

United States District Court for the District of

In Bankruptcy.

In the matter of Bankrupt. } Petition for Leave to Abandon.

..... is the duly elected, qualified and acting trustee of the estate of the above named bankrupt; and there has come into his control as such trustee the following property, to-wit:

The said property is of the value of \$....., but is encumbered by good and valid liens in excess of said value to the amount of \$..... [to-wit the following liens, ...] and there is no equity therein for unsecured creditors.

Wherefore this trustee prays the Court for an order authorizing him to abandon all title to said property and to disclaim the same.

.....
[Verification]

[UNOFFICIAL FORM NO. 73.]

Specifications of Grounds of Opposition to Bankrupt's Discharge.

United States District Court for the District of

In Bankruptcy.

In the matter of Bankrupt. } Specifications of Grounds of Opposition to Bankrupt's Discharge.

..... of in the County of and State of a party interested in the estate of said bankrupt [or "the trustee duly appointed and qualified herein, and duly authorized to oppose the bankrupt's discharge by a meeting of creditors heretofore held, to-wit on the day of, 191., of which meeting ten days due notice by mail was given to all creditors"], does hereby oppose the granting to him of a discharge from his debts; and for the grounds of such opposition does file the following specifications:

First Specification [Failure to Keep Books]: Said Bankrupt has, with intent to conceal his financial condition, failed to keep books of accounts or records, from which such condition might be ascertained.

Second Specification [Destruction of Books]: Said bankrupt did on or about the . . . day of, 19.., destroy a certain which was a book of account from which his financial condition might have been ascertained, the precise entries of which this objecting creditor is unable, for want of actual knowledge and for means of acquiring knowledge to state, and which lie more properly within the knowledge of the bankrupt.

Third Specification [Concealment of Assets]: On or about the . . . day of, 19.. whilst a bankrupt and after the appointment and qualification of his trustee, ... the above named bankrupt knowingly and fraudulently concealed the following assets belonging to his estate from said trustee, to-wit:

Fourth Specification [Concealment by Omitting Fraudulently Transferred Property from Schedules]: On or about the . . . day of, the bankrupt, for the purpose of hindering, delaying and defrauding his creditors, transferred to certain of his property as follows, to-wit:

 and the said property at the time of the appointment and qualification of the trustee herein was being held on secret trust by said for the bankrupt.

Said bankrupt knowingly and fraudulently omitted said property from his schedule of assets herein and failed to reveal to said trustee the existence of the same or the facts as to the title thereto and fraudulently and knowingly concealed said property, so as aforesaid belonging to his estate, whilst such bankrupt, from his said trustee.

Fifth Specification [False Oath]: On or about the . . . day of, in the bankruptcy proceedings of, ... the bankrupt herein knowingly and fraudulently made a false oath [or account] in [relation to] said proceedings in bankruptcy, as follows, to-wit: said bankrupt omitted the following property from his schedules and yet did then and there knowingly and fraudulently make oath to said schedules that they were a true statement of his assets [or, did then and there, after being duly sworn on general examination, state that here set forth the words] whereas the truth and fact were, as said bankrupt well knew, that
 which testimony [omission] was material in that it pertained to the discovery of the acts, conduct and property of the bankrupt [in that the said property so omitted was his property and was of value].

Sixth Specification [Obtaining Property on Credit]: On or about the . . . day of, ... the above named bankrupt obtained on credit the following described property from; and he obtained said property by the statement, made in writing to such person that

Whereas in truth and fact and said statement was materially false and was made for the purpose of obtaining such property on credit.

[Verification]

[UNOFFICIAL FORM NO. 74.]

Notice of Hearing of Discharge Petition.

District Court of the United States for the District of Division.
In Bankruptcy.

In the matter of	}	Notice of Hearing of Discharge Petition.
....., Bankrupt.		

To all Creditors of said Bankrupt:

Take notice that a petition has been filed in said court by of the County of, in said District, who has been duly adjudged a bankrupt under the Act of Congress of July 1, 1898, for a discharge from all his debts, and other claims provable under said Act, and that the day of, 19.., at o'clock .. M. is assigned for the hearing of the same before the Hon. Judge of said Court, at the United States District Court of said district, when and where you may attend and show cause, if any you have, why the prayer of said petition should not be granted.

.....
Referee in Bankruptcy.

[UNOFFICIAL FORM NO. 75.]

Petition for Review of Referee's Order.

United States District Court for the ... District of

In Bankruptcy.

In the matter of	}	Petition of for Review of Referee's Order.
....., Bankrupt.		

Petitioner is the duly elected, qualified and acting trustee of the above named bankrupt, [or, petitioner is the bankrupt herein], [or, petitioner is a creditor of the above named bankrupt] and as such was a party to the following certain proceedings in said bankruptcy pending before Esq., as the referee in bankruptcy in charge thereof, to-wit:

Upon the hearing thereof a final order was made by the said referee, as

follows, to-wit:

To which order petitioner duly excepted.

Said order is erroneous in this, that

Wherefore, petitioner prays that said order be reviewed and reversed [or modified in the following particulars, to-wit] and that he be restored to all things he has lost by reason of said error.

.....

[UNOFFICIAL FORM NO. 76.]

Petition to Review in Matters of Law under Section 24-B.

United States Circuit Court of Appeals for the Circuit.

In the matter of }
....., Bankrupt. }

To the Honorable Judges of the United States Circuit Court of Appeals
for the Circuit:

Your Petitioner, ..., appearing by, his attorney,
respectfully represents that:

1. On the day of, 19..., ... was duly adjudged
bankrupt in the United States District Court for the District of
....., and thereafter such proceedings were had as that your petitioner
was appointed trustee of the estate of said bankrupt, and your petitioner
thereupon qualified and has ever since been acting as such trustee.

[Or, if by a creditor:

1. Your petitioner on review is a citizen of the United States and resides
at in the city of, State of, and is a creditor of the
above named, who was duly adjudged a bankrupt by the United
States District Court for the District of, on the day
of, 19...]

2. On the day of, 19..., etc. [Here make a brief resume of
the facts in the case sufficiently apt to set forth the questions involved as,
for example: "The bankrupt was indebted to your petitioner in the sum
of \$....., and on that day mortgaged the property in question to your
petitioner to secure the debt, but * * *," etc.]

3. [If the matter was first heard before the referee in bankruptcy, state
the proceedings had before the referee in some such manner as follows:
After adjudication of bankruptcy the proceedings for the administration
of the interest were duly referred to Esq., referee in bank-

ruptcy, before whom a petition was duly filed, etc., etc.] [setting up what proceedings actually took place before the referee] upon the hearing whereof said referee entered the following order, to-wit: [Here set forth referee's order].

4. To said order of said referee your petitioner duly excepted and duly filed his petition for review thereof, and thereafter duly filed a brief summary of the evidence together with a statement of the questions involved as provided by law.

5. Said petition for review came on to be heard before the Hon. Judge of the United States District Court who, upon consideration thereof, reversed said order [or affirmed the same, or, in all respects affirmed the same, or, affirmed the same in part and reversed same in part] to wit, entering the following order:

6. Your petitioner duly excepted to said order of said district court and thereupon duly filed in this court his petition to revise, together with a statement of facts and record in the case ["a copy of which is filed herewith as Exhibit," and your petitioner asks that the same be made a part of this petition."] [Let it show that the questions do not involve disputed questions of fact.]

7. Said judgment [or decree, or order, as the case may be] of the district court was erroneous in matter of law in that [Here state the errors complained of as, for example: (1) [If the trustee is the petitioner on review] Said chattel mortgage upon said property not having been recorded until within the four months preceding bankruptcy while the bankrupt was insolvent, was a preference and was received with reasonable grounds for believing that a preference would result, and your petitioner as trustee, became possessed of the title thereto; or,

(2) Said lien by legal proceedings was obtained within four months of the bankruptcy, while the bankrupt was insolvent, and was therefore void as against the trustee; or,

(3) [If an adverse claimant is the petitioner on review] Said funds were trust funds, and your petitioner as beneficiary of the trust, was entitled to reclaim the same from the trustee;

(4) [Said order should have been for your petitioner and not for the trustee, etc., etc.]

Wherefore, your petitioner prays that said order and judgment be reviewed, revised and reversed, and that he be restored to all things that he may have lost thereby.

Dated 191...

[Verification]

[UNOFFICIAL FORM NO. 77.]

Notice of Filing of Petition for Review.

United States Circuit Court of Appeals for the Circuit.

In the matter of Bankrupt. } Notice of Filing Petition for Review.

Please take notice that on the day of at .. o'clock, I will file in the clerk's office of the United States Circuit Court of Appeals for the Circuit, in the city of, a petition for review in the above entitled cause, [a copy of which petition is annexed hereto and made a part of this notice].

.....
Attorney for Petitioner.
 Address.

To Esq.,
 Attorney for
 Address.

[UNOFFICIAL FORM NO. 78.]

Motion for Stay Pending Review.

United States District Court for the District of
 In Bankruptcy.

In the matter of Bankrupt. } Motion for Stay Pending Review.

Your Petitioner on review herein, ... appearing by
, his attorney, moves the court for an order staying proceedings herein pending review of a certain order heretofore, to wit, on the ... day of, 191., entered herein, denying your petitioner's petition for [reclamation of certain goods from the possession of the trustee]; and as ground therefor states [here set forth the proceedings had].

[UNOFFICIAL FORM NO. 79.]

Notice of Motion for Stay Pending Review.

United States District Court for the District of
 In Bankruptcy.

In the matter of Bankrupt. }

Sir:

Please take notice that has filed his motion for stay of proceedings pending the hearing of his petition for review herein, and that said motion will be for hearing before the Hon., Judge of the United States District Court for the District of at the Federal Building, in the city of on the day of, 191.., or as soon thereafter as counsel may be heard.

.....
Attorney for Petitioner on Review.

To Esq.,
 Attorney for

 [UNOFFICIAL FORM No. 80.]

Order Staying Proceedings Pending Hearing on Petition for Review.

United States District Court for the District of

In Bankruptcy.

In the matter of }
, Bankrupt. }

Upon motion of, petitioner for review, and for good cause shown, it is

Ordered that further proceedings be stayed pending the hearing and determination of the petition for review herein, upon the filing in this court of bond with good and sufficient sureties to the satisfaction of the court, in the sum of \$.....

.....
United States District Judge.

 [UNOFFICIAL FORM No. 81.]

Notice of Appeal.

United States District Court for the District of

In Bankruptcy.

In the matter of }
, Bankrupt. } No.

Sir:

Please take notice that hereby appeals from the order made herein on the day of, 191.., [denying his petition for

reclamation or granting the trustee's petition, etc.] to the United States Circuit Court of Appeals for the Circuit.

Dated 191...

Yours, etc.,

.....
Attorney for

To Esq.,

Attorney for

—————
[UNOFFICIAL FORM No. 82.]

Petition for Appeal to the Circuit Court of Appeals.

United States District Court for the District of

In Bankruptcy.

In the matter of }
....., Bankrupt. }

To the Honorable Judges of the United States District Court for the
District of

Your Petitioner, ..., conceiving himself aggrieved by the certain order entered on the day of, 191..., in the above entitled proceedings, denying [his petition for reclamation, if so] does hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the, Circuit, and prays that his appeal may be allowed and that a citation may be granted, directed to [the trustee herein] commanding him to appear before the United States Circuit Court of Appeals for the Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said proceedings duly authenticated, may be transmitted to said United States Circuit Court of Appeals for the Circuit.

.....
By
His Attorney.

The foregoing appeal is
hereby allowed this
day of, 19...

.....
United States District Judge.

[UNOFFICIAL FORM NO. 83.]

Assignment of Errors.

United States District Court for the District of
In Bankruptcy.

In the matter of }
....., Bankrupt. }

Now comes appellant, and files this his assignment of errors, complaining as follows:

1. That the said order of the District Court, denying his petition for reclamation, was against the weight of the evidence;

2. That the court in making said order held that the statutes of the State of required the said instrument to be recorded, whereas the same was not an instrument required to be recorded;

3. [etc., etc.]

.....
By
His Attorney.

[UNOFFICIAL FORM NO. 84.]

Bond on Appeal.

United States District Court for the District of
In Bankruptcy.

In the matter of }
....., Bankrupt. }

Know all men by these presents: That we as principal and as surety, are held and firmly bound unto the above named in the sum of \$..... for the payment of which well and truly to be made we bind ourselves, our administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this ... day of, 191...

Whereas, an order was entered in the above entitled proceedings in the District Court of the United States for the District of on the day of allowing an appeal to the United States Circuit Court of Appeals for the circuit from a certain order by said United States District Court made on the day of, 191..., wherein was petitioner and was respondent.

Now, therefore, the condition of this obligation is such that if the above named shall prosecute his appeal to effect and answer all damages and costs if he fails to make said appeal good then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Attest.

In the matter of
....., Bankrupt. }

United States of America, ss:

The President of the United States to

Greeting:

Your [and each of you] are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Circuit, in the City of on the day of, 191., pursuant to an appeal duly obtained and filed in the Clerk's office of the District Court of the United States for the District of wherein you [as trustee] are appellee and is the appellant, to show cause, if any there be, why the order in said appeal mentioned should not be reversed and corrected and why speedy justice should not be done to the parties in that behalf, and to do and receive that which may appertain to justice to be done in the premises.

Witness the Hon., United States District Judge for the District of on the day of, in the year of our Lord one thousand nine hundred and

.....
United States District Judge.

[UNOFFICIAL FORM NO. 87.]

Trustee's Petition in Federal Court in Plenary Suit to Recover Assets Fraudulently or Preferentially Transferred by the Bankrupt. under Amendment of 1903.

United States District Court for the District of

....., as Trustee	}	Petition.
in Bankruptcy of,		
Bankrupt.		
v.		
..... Defendant.		

Your petitioner, ..., as trustee in bankruptcy of, appearing by, his attorney, respectfully represents that:

1. By the consideration of the United States District Court of the District of said, was duly adjudged bankrupt on the day of, 19., upon an involuntary petition filed against him [or, upon a voluntary petition filed by him] on the of 19.; and thereafter such proceedings were had as that your petitioner was duly appointed trustee of the bankrupt's estate and effects, whereupon he qualified and ever since has been, and now is, acting as such trustee.

2. [The following allegation should, out of abundance of caution, be inserted to avoid controversy over an unsettled question of practice]: The assets of said estate are insufficient to pay the creditors thereof in this, that

the value thereof so far as the same are reduced to the possession of the trustee are approximately \$., and the liabilities in addition to the costs of administration, are approximately \$.

3. On or about the day of [here set forth the cause of action. If the case is brought in the United States District Court and diversity of citizenship or other Federal jurisdiction does not exist, the cause of action must show fraudulently or preferentially transferred property, the recovery of which, or the recovery of the value of which, is to be prayed for] [See ante, § 1712 et seq.] [If the action is to recover a preference, be careful to assert facts showing the existence of each and all of the nine various elements of a preference mentioned infra.]

Wherefore, your petitioner prays [if the action is at law for recovery of value, then let the prayer follow the usual form; if in equity, for a setting aside of fraudulent transfers, etc., and the bringing in of the property, then the prayer should be adapted to the relief prayed for.]

.....,

Trustee in Bankruptcy of

.....

[Verification]

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GENERAL INDEX

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Treating "petition for revision" as "appeal," § 2916.

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May not treat "petition for revision" as "appeal," § 2916.

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Single assignment of errors sufficient where appeal and review simultaneously prosecuted, § 2919.

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Seizures on warrants to marshal are not, § 2872.

Orders of sale, and incidental questions are not, § 2876.

Trustee's petition to marshal liens is, §§ 2878, 2923.

Marshaling of firm and individual assets and debts, § 2879.

Contempt proceedings, whether, § 2879¼.

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Petition to marshal liens on property in trustee's custody a "controversy," § 2878.

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APPEAL, REVIEW AND ERROR—Continued.

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APPEAL, REVIEW AND ERROR—Continued.

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APPEAL, REVIEW AND ERROR—Continued.

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- Petition to be filed with referee, § 2850.
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- In petition for review, not requisite, § 2976.
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- Date of entering order or judgment, not of actual rendition, fixes date, § 2984.
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By analogy should be filed within six months' time, § 2997.

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Time for review in bankruptcy proceedings proper, ten days by analogy, § 2999.

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Time for appeal in "bankruptcy proceedings" proper.

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Rehearing, whether granted "after term," where order based on authority since overruled, § 3000.

United States Supreme Court, in**Appeals from courts of bankruptcy****In "bankruptcy proceedings" proper**

Only allowance or rejection of claims appealable, § 2013.

Only permissible, then, if amount in controversy exceeds \$2,000 and question involved is one which, etc., § 3014.

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Claim of secured creditor, where security alleged fraudulently transferred in violation of Section 67 (e), § 3014.

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Jurisdiction determined by pleadings, § 3019.

Jurisdiction of trial court as federal court, § 3019.

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Appeals to Supreme Court to be taken within thirty days, § 3022.

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"Other cases" refer to cases covered by act creating Circuit Court of Appeal, § 3017.

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Jurisdictional questions, in "controversies," appealable directly from District Court to Supreme, only where jurisdiction would exist if not concerning bankruptcy, § 3019.

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Thirty days rule has no application to appeals taken under Section 24 (a) but is confined to appeals taken under Section 25 (b), § 3022.

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Questions of construction of Bankruptcy Act, § 3025½.

One construction defeating lien, other construction sustaining, § 3025½.

Reviewable when presents federal question, § 3026.

Highest State Court's decision as to scope of prior state judgment, presents no federal question, § 3027.

Purchaser from trustee pendente lite, whether bound by state court's decree against trustee, § 3027.

Review and error proceedings from courts of bankruptcy

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Applying payments on wages earned before three months, to leave later wages entitled to priority, §§ 1190, 2179½.

Creditor's right to apply in absence of debtor's instructions, unimpaired by bankruptcy, § 1190.

To be as equity requires in absence of directions, § 1191.

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Rights of parties as to, unimpaired by bankruptcy, § 1189.

Assigning book accounts under one continuous arrangement, § 1191.

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Of referee, § 498.

Of trustee

See "Trustee, Election and Appointment of."

APPOINTMENT OF TRUSTEE AS ACT OF BANKRUPTCY

See "Trusteeship as Act of Bankruptcy."

Also, see "Receiverships and Trusteeships as Acts of Bankruptcy."

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ARREST AND DETENTION OF BANKRUPT

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Compelling trustee to execute, on ordering him to surrender property to rightful owner, § 1873.

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Life insurance policies assigned as security, bankrupt's interest therein passes to trustee, §§ 1006.

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Preceding bankruptcy, effect on right to forfeit leasehold, § 987.

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ASSIGNMENT OF ACCOUNTS

Before four months, but collections within, whether preference, § 1370½.

Book accounts assigned at different times under one continuous arrangement

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- Sec. 67 (a).—§§ 1137, 1138, 1143, 1208, 1210, 1221, 1227¾, 1257, 1269, 1270, 1507, 1603, 1896.
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Sufficient to pass title to goods sold, pledged or in process of manufacture, §§ 1145, 1146.

Trustee bound by bankrupt's acts of delivery, § 1145.

Customary course of business in common carrier's office as proof of receipt of goods by bankrupt, § 2328½.

Mere transmitting of actual possession within four months, after previous sufficient setting apart to constitute pledge, not a preference, § 1370.

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Meaning of, dependent on state law, § 631.

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Necessary to effect preference, § 1278.

Of individual estate, not preference in partnership bankruptcy, § 1291.

Of partnership, where partnership not in bankruptcy, but assets being administered in bankruptcy of member, § 1290.

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Transfers based on present consideration, not preferences, § 1295.

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On composition, §§ 2364, 2365, 2366, 2367, 2368.

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DEPOSIT IN BANK

Appropriated by bank on debt, but not applied thereon by bankrupt not preference, §§ 1180, 1297, 1341.

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Appropriation of, by bank to apply on loan, not a preference, §§ 1329, 1341.

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Prima facie case for claimant, § 844.

But not prima facie case for allowance as priority claim, § 845.

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Creditors' status on petition for removal of trustee, whether established by, § 944.

Prima facie case for claimant, § 844.

Claimant must rely and stand upon deposition, and not introduce proof aliunde in first instance, § 844.

Not prima facie case for reclamation of converted property, § 845½.

Whether prima facie proof of ownership of claim itself, § 845.

DEPOSITORY

- In composition cases, designation of, § 2364.
- Depository liable for payment of improperly drawn order, § 913.
- Failure to deposit in, § 910.
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- Duty to deposit in, § 909.
- Failure of state institution appointed as summary jurisdiction as to funds, §§ 1637, 1822½.

DEPOSIT FOR COSTS, § 285.**DESIGNATION OF HOMESTEAD**

- May be made after bankruptcy, § 1023.

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- During pendency of petition, § 1122.

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- See "Arrest and Detention of Bankrupt."

DETENTION OF BANKRUPT

- See "Arrest and Detention of Bankrupt."

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- Method stipulated in contract, creditor entitled to pursue, § 760.
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- Which of remaining four methods, left to court's discretion, § 762.
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DIFFERENT BANKRUPTCY PROCEEDINGS PENDING AT SAME TIME, §§ 292, 299.

- Voluntary and involuntary petitions in same district—bankrupt's domicile preferred, § 304.
- Bankruptcy proceedings absolute precedence over federal proceedings in same district, § 305.
- Consolidation of partnership, corporation and individual petitions, § 304½.
- Court making first adjudication retains jurisdiction, § 296.
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- Petition in district of domicile first to be heard, § 293.
- Which petition to be first heard, § 298½.
- Subsequent voluntary petition allowable though involuntary pending, § 299.
 - But notice to petitioning creditors first, before adjudication on voluntary petition, § 300.
 - Precedence to involuntary petition where creditors' rights require, § 301.
 - But adjudication on voluntary, an absolute right where creditors' rights not imperiled, § 302.
 - Staying involuntary petition to ascertain propriety on voluntary, § 303.

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- Excluded in determining whether total creditors less than twelve, § 200.
- May be petitioning creditors, § 215.
- Candidates for trustee, § 887.
- Directors' and officers' liability for misappropriation of corporate funds, provability of, § 651.

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DISBURSEMENTS

By check, countersigned, § 912.

Commission computed on, meaning of term, §§ 2103, 2104, 2105, 2109, 2110, 2111.

Order of court requisite, § 911.

DISCHARGE

Appealability, of judgments granting or refusing, §§ 2893, 2895, 2897.

Bankrupt's testimony on general examination, admissible, notwithstanding, § 7 (9), § 1557.

Bars debts, not enforcement of liens nor title to property, § 2668.

Barring of debt by, distinguished from invalidating of liens obtained by legal proceedings, § 1435.

Certificate of, is proof of, § 2684.

"Certificate of conformity," none under present act, §§ 518½, 2428½, 2457.

Collateral attack on jurisdiction for lack of "residence," § 2478.

Confirmation of composition in effect, is, § 2349.

Due process of law, whether discharge in bankruptcy is, § 12.

Equivalent to return of execution unsatisfied, §§ 1523, 2200.

No levy on exempt property after, §§ 1102, 2679.

Levying on exempt property before and after discharge, §§ 1102, 2679.

Notice to be given to all creditors, § 565.

Adjudication as to fraud, upon hearing of discharge, not res judicata in suit by trustee, to set aside fraudulent conveyance, § 1774.

Personal notice not essential to validity of discharge, § 19.

Right to not affected by death or insanity, §§ 98, 2420, 2421.

Bankrupt may be examined after, § 1542.

Refusal of for concealment, whether res judicata on summary order to surrender assets, § 1845.

Refusal of, see "Discharge—Second Petition for." Also, see "Discharge—Res Judicata."

Release from debts not main nor essential idea of bankruptcy law, *Intro.* (a), § 2415.

Whether bankrupt allowed attorney's fees out of estate, for petition for discharge, § 2087.

Who may oppose, see "Discharge—Opposition to—Who May Oppose."

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"Bankruptcy proceedings proper" and not mere "controversies arising in," § 2865½.

Collateral attack on, §§ 2442, 2443, 2444, 2478, 2686.

Discharge not impeachable collaterally, §§ 2442, 2478, 2686.

Except for absolute want of jurisdiction apparent on face, § 2442.

Avoiding effect of discharge by showing debt excepted, is not, §§ 2443, 2444, 2667.

Corporations entitled to, § 2419.

No discharge of corporation, under Act of 1867, § 2419.

History of, § 2415.

First provision for discharge in early bankruptcy law, *Intro.* (i).

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DISCHARGE—Continued.**Debts discharged and not discharged**

All "provable" debts discharged, save those excepted: if not "provable," not discharged, § 2731.

Promise to buy stock at future day, falling on day after seller's adjudication of bankruptcy, § 2731.

Contingent claims not provable, not discharged, § 2736.

Ex contractu claims discharged though also presentable in tort, § 2733½.

Breach of warranty on a sale, actual fraud also existing, § 2733½.

Judgments for torts discharged, though liability on which founded not, § 2740.

Only debts existing at date of filing petition discharged, § 2735.

Liquidating partner's claim against bankrupt partner upon liquidation of firm affairs out of bankruptcy court, § 2735.

Subsequently earned salary, § 2736½.

Sureties' and endorser's claims against bankrupt principal discharged, § 2741.

Accommodation endorsement of bankrupt where note does not fall due until after bankruptcy, § 2741.

Contractual relations not dissolved by discharge, unless mergeable in "provable" debt, § 2729.

Relation of landlord and tenant not served, § 2730.

If capable of being "proved," debt discharged whether actually proved or not, § 2732.

Tort claims discharged, if tort might be waived and claim be presented ex contractu, § 2733.

Unliquidated claims, if capable on liquidation of being presented ex contractu, § 2734.

Costs incurred prior to petition dischargeable, § 2737.

Costs incurred after, not discharged, § 2738.

Judgment for breach of promise of marriage discharged, § 2739.

Stockholder's liability dischargeable if fixed, § 2742.

Because excepted, not entitled to priority before dividends, § 2744.

Certain "provable" debts excepted, § 2743.

Debts excepted from**Fraud, embezzlement and defalcation, while officer, etc.**

"Fraud" means moral turpitude or intentional wrong, § 2788.

"Fraud" must have existed in original transaction, § 2789.

Judgment not such merger as prevents inquiry into character of fraud, § 2790.

Debts for are not discharged, § 2783.

Must be committed while acting as "officer" or in "Fiduciary capacity," § 2784.

"Fiduciary capacity" refers to express trusts and excludes conversions by agents, etc., also fraudulent transfers, § 2785.

"Fiduciary" relation must exist independently of transaction in which debt arose, § 2786.

Whether includes "officers" of private corporation, § 2787.

Factor, § 2785.

Naked bailee of money

Stockbroker's conversion of stock, §§ 2754¼, 2785.

Debts not "duly scheduled," § 2761.

Failure to give street number where ascertainable, § 2770.

DISCHARGE—Continued.

- Giving name and street correctly, but city wrong, not "due scheduling," § 2771.
- "Idem Sonans," § 2772.
- Innocent intent in faulty scheduling, no excuse, § 2773.
- Where actual address unknown, a guess at surmised address not sufficient, § 2774.
- Initials instead of full given names, § 2763.
- Abbreviations, § 2764.
- Ditto marks, § 2765.
- Partnership debts in individual bankruptcy of partner, § 2766.
- Debts intentionally scheduled in name of original payee when held by third person, § 2767.
- Original creditor sufficient where no notice of assignment, § 2768.
- Stockholders' liability either corporate creditors, or receiver, may be scheduled, § 2769.
- Where all addresses stated to be unknown, court to withhold discharge until satisfied due diligence exercised, § 2776.
- Actual knowledge by creditor cures defective scheduling, § 2777.
- Agent's knowledge imputable to principal, § 2779.
- Knowledge not sufficient unless in time for creditor to avail himself of benefits of law, § 2780.
- Defending that debt not "duly" scheduled, not collateral attack, § 2781.
- After discharge too late to amend schedules to include omitted creditors, § 2782.
- "Due" scheduling dependent on facts in particular case, § 2762.
- Office address instead of residence, § 2772½.
- Reasonable diligence in ascertaining correct address requisite, § 2775.
- Failure to look in business directory of great city, § 2775.
- No particular form of notice requisite, § 2778.
- Direct statement, § 2778.
- Reading newspapers, § 2778.
- Verbal communication, § 2778.

Liabilities for alimony

- Are excepted, § 2755.
- Alimony exception simply declaratory of law as already existing, § 2756.
- New judgment in one state on alimony decree in another state, whether makes claim dischargeable, § 2755.

Liabilities for obtaining property by false pretenses or false representations

- Are not discharged, §§ 2745, 2746.
- Not all frauds excepted, but only "obtaining property by false pretenses," etc., § 2747.
- Judgment not requisite, § 2748.
- Judgment whether such merger as prevents inquiry into original liability, §§ 2749, 2754½.
- Judgment whether such merger as to exclude original nature even where tort waived and judgment on quasi contract, § 2750.
- Judgment, whether operates as res judicata upon nature of obligation, § 2749.
- False representations not necessarily in writing, § 2751.
- False representations to mercantile agency sufficient, § 2752.
- Reckless representations sufficient, § 2753.

DISCHARGE—Continued.**Liabilities for obtaining property by false pretenses or false representations**

False representations made afterwards, insufficient, § 2753¾.

Laches in asserting fraudulent origin of obligation, § 2750.

Proving claim in bankruptcy not waiver of exception from dischargeability, § 2750½.

Tort waived and judgment on quasi contract, whether judgment prevents inquiry into original nature of obligation, § 2750.

Withdrawal of objections to discharge based on same fraud, not res judicata as to dischargeability, § 2746.

Unsuccessful opposition to discharge for false statement in writing whether res adjudicata that debt not on false pretenses, § 2750¾.

Liabilities for willful and malicious injuries to person or property, § 2754.

Are excepted, § 2754.

Assault and battery, § 2754.

Conversion of customer's stock by bankrupt stockbroker, § 2754¼.

False imprisonment, § 2754.

Willful conversion of property constituting liability for willful and malicious injury to property, § 2754¼.

Libel, § 2754.

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Judgments upon, whether prevents inquiry into original nature of obligation, §§ 2754, 2754½.

Assault and battery, § 2754.

False imprisonment, § 2754.

"Full faith and credit" to be given to judgment "for willful or malicious injury to person or property," § 2754.

Libel, § 2754.

Saloon keeper selling whiskey in excess and then giving chloral causing death, § 2754.

Surgeon's negligence in performing operation, § 2754.

Seduction or criminal conversation

Are excepted, § 2760.

Support of wife or child

Are excepted, § 2757.

Simply declaratory of law as already existing, § 2758.

Liabilities to third parties not excepted—only liabilities directly to wife or child, § 2759.

Taxes, § 2745.

Imputing acts of agent

Partner making false statement in writing to obtain credit, § 2793.

Of individual debts, in partnership bankruptcies

Where individuals adjudged bankrupt with partnership, individual debts discharged, § 2803.

Where individuals not adjudged bankrupt with partnership, individual debts not discharged, § 2804.

Nature and effect of discharge, § 2414.

Nondischargeable debts, if "provable," share in dividends, § 2670.

Secondary liability, unaffected, §§ 1510, 2671.

Debt not extinguished, but its enforcement barred, § 2672.

Refusal of discharge, does not prevent passing of title to trustee, § 1134.

Rights of creditor against sureties, etc., not affected by, §§ 1510, 2671.

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DISCHARGE—Continued.

- Claims capable of liquidation but not liquidated, nevertheless discharged, § 732.
- Transactions, themselves, not invalidated because of being bars to discharge, § 2674.
- Contractual relations not dissolved, unless mergeable in "provable" debt at time of bankruptcy, §§ 2675, 2729.
- Contracts for liens on after-acquired property discharged, if mergeable in provable debt at time of bankruptcy, § 2676.
- Right to discharge and effect of discharge distinct matters, § 2662.
- Decree of discharge to be general, § 2664.
- No limiting of effect, nor excepting of particular debts, in decree, § 2665.
- Except where former discharge refused, § 2666.
- Urging debt to be not "provable" or to be within exceptions of § 17, not "collateral attack," § 2667.
- Bankrupt remains liable on debts not dischargeable, collectible out of subsequently-acquired assets; § 2669.
- Where lien exists in *præsenti* before bankruptcy, though property acquired afterward, discharge no bar, § 2677.
- Assignments of unearned wages, § 2678.
- "Waiver of exemption" notes; no levy on exempt property after discharge, § 2679.
- Is a distinct incident, not an essential of bankruptcy, § 2415, *Intro.* (a).
- May "go into" or be "thrown into" bankruptcy repeatedly, irrespective of refusal or granting of, § 2416.
- Discharge not to affect trustee's right to recover property fraudulently transferred, § 1209.
- Does not prevent trustee pursuing bankrupt for assets, § 2668½.
- Assignments of unearned wages, § 2678.
- Discharge bars debts, not enforcement of liens or title to property, §§ 2668, 2673.
- Fraudulent transfer suit started more than four months before bankruptcy, § 2668.
- Dismissal of or failure to file petition for discharge, in effect a judgment denying a discharge, § 2436.
- Neglect of counsel not sufficient excuse, § 2436.
- Order of dismissal to be entered, else not *res judicata*, § 2436.
- Effect of discharge on particular debt to be determined when enforcement of debt attempted, § 2663.
- Refusal of injunction, § 2663.
- Surrogate may pass on effect of discharge on particular debt, § 2663.
- Erroneous judgment notwithstanding discharge duly pleaded and proved, *res judicata*, until reversed, § 2687.
- Former refusal of discharge *res judicata* as to all claims then provable, § 2680.
- Not if former refusal was under state insolvency proceedings, § 2681.
- Importance of discharge in business world, § 2415.
- Limiting effect of decree or excepting of particular debts, where former discharge refused, § 2666.
- Subsequently earned wages coming under prior levy, § 2678½.
- Valid liens not cast off nor their enforcement prevented, §§ 2668, 2673.
- Assignments of unearned wages, § 2678.
- Subsequently earned wages coming under prior levy, § 2678½.

DISCHARGE—Continued.

Whether affects valid liens on exempt property, §§ 1100, 1447½.

Opposition to

Burden of proof on opposing creditor, § 2635.

Presumptions of fact may shift against bankrupt and compel rebuttal, § 2636.

Burden of proof on objecting creditor as to each element of ground charged, § 2637.

Collateral attack on jurisdiction for lack of "residence," § 2478.

Death not to abate opposition proceedings, § 2456.

Evidence need not be "beyond reasonable doubt," § 2638.

Where "offense" charged, evidence to be "clear," "satisfying" or "convincing," § 2639.

Whether same degree of proof requisite where ground charged not a punishable "offense," § 2640.

"General Examination" of bankrupt admissible, § 2641.

General examination competent though "offense" charged, § 2642.

All questions for judge, not for referee, §§ 2447, 2625.

Judge may appoint a special master, § 2626.

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General examination of other witnesses than the bankrupt, not admissible, § 2643.

Unless so stipulated, § 2644.

Ordinary rules determine admissibility and credibility, § 2645.

Failure to produce material witnesses who are accessible, § 2646.

Failure of creditors to take steps to recover property alleged fraudulently concealed, § 2647.

Evasive testimony of bankrupt: credibility, § 2648.

Contradictory statements and incredible explanations, § 2649.

Costs on, § 2658.

Power to award, inherent, § 2659.

Referee allowed compensation as special master, § 2660.

Awarding costs against creditors, § 2661.

Costs of unsuccessful appeal by creditors sometimes awarded against bankrupt, § 2661.

Whether chargeable to estate, § 2658.

Trustee's costs and expenses, § 2060½.

Grounds of**Added by amendment of 1903, § 2552.**

See "Discharge—Opposition to—Grounds of—Refusal to Obey Court's Order or to Answer Question as Bar."

May apply to acts committed before 1903, §§ 2552, 2558, 2576.

See "Discharge—Opposition to—Grounds of—Transfer, Removal or concealment within Four Months, as Bar."

See "Discharge—Opposition to—Grounds of—False Statements in Writing to Obtain Property on Credit."

See "Discharge—Opposition to—Grounds of—Previous Discharge within Six Years as Bar."

"Concealment of assets"

In general, § 2487.

"Knowingly and fraudulently," § 2488.

Intent to conceal, most important element, § 2489.

Honest mistake, even mistake of law, excused, § 2490.

DISCHARGE—Continued.

Advice of counsel may negative intent, § 2491.

When advice of counsel insufficient, § 2492.

"Secret Trust" in bankrupt's favor generally requisite to show continuing and intentional concealment of fraudulent transfers, § 2511.

"Secret trust" not requisite where "fraudulent conveyance within four months" ground charged, § 2512.

Proof of secret trust may show preferential transfer really to be fraudulent, § 2511.

"Concealment" and "Fraudulent and knowing intent" provable otherwise than by continuing secret trust, § 2513.

Must be of property "belonging to estate," § 2514.

Property must be recoverable, else not, § 2506.

Even where fraudulent transfer occurred more than four months before bankruptcy, if property still recoverable, discharge is barred, § 2507.

Where it occurred before passage of act, if still recoverable, § 2508.

Where no debts existed and transfer only because in contemplation of future creditor, § 2509.

Concealment must be concealment from trustee, § 2499.

Concealment before appointment of trustee, insufficient, § 2500.

Mere inability to account reasonably for assets not per se proof, though strong evidence, § 2501.

Concealment by purposely omitting assets from schedules, § 2502.

Amendment after discovery will not cure, §§ 2503, 2520.

Because property claimable as exempt, fraudulent intent not necessarily negated, § 2493.

Such fact of weight as evidence, § 2494.

Willful undervaluing of scheduled assets whether concealment, § 2495.

Preference not amounting to fraudulent concealment, no bar, § 2496.

Concealment must be "while a bankrupt" or after discharge, § 2497.

Exact value of assets concealed need not be capable of ascertainment, if of value, § 2517.

Even if of small value, intentional concealment will bar, § 2518.

Failure of creditors to institute legal proceedings to recover concealed property tends to rebut, § 2519.

Instances held sufficient to bar discharge for concealment of assets, § 2521.

Instances held insufficient to prove fraudulent concealment, § 2522.

Aiding trustee, after committing offense of concealment of assets, of no avail, § 2520½.

Before appointment of trustee, but continuing after, § 2500.

Beginning new business as agent for another, § 2516.

As agent for wife, § 2516.

"Continuing," concealments, § 2498.

Fraudulent transfer occurring more than four months before bankruptcy, where property still recoverable, § 2507.

DISCHARGE—Continued.

Merely working for another even without pay, while insolvent, no concealment, § 2515.

Omission to schedule, not per se concealment but evidence, § 2504.

Presumption of continued possession when property once traced and shortage unexplained, § 2501½.

Property held on "secret" or resulting trust, title never having been in bankrupt, § 2510.

Systematically buying real estate, placing title in wife's name, § 2510.

Purposely omitting assets from schedules, § 2502.

Omission to schedule transfers to near relatives, § 2505.

Destruction, failure to keep and concealment of books of account

Whether allegations in mere words of statute sufficient, § 2608.

As bar to discharge, § 2544.

Property exempt, or not recoverable, etc., not necessarily negatives intent to conceal, § 2547.

Keeping books in same defective manner for long period tends to negative intent, § 2548.

No special manner of keeping books requisite, § 2549.

"In contemplation of bankruptcy" no longer requisite, §§ 2544, 2545.

Concealment or destruction of books, etc., which might have aided in ascertainment of financial condition, § 2550.

Account books in barrel in cellar upon selling out business, not concealment, § 2550.

"Continuing concealments," § 2555½.

Effect of failure to record until within four months, § 2554½.

Partners, acts of, whether imputable to bankrupt, § 2485.

Intent to conceal financial condition essential, § 2545.

Intent to defraud creditors thereby not essential, § 2545.

Purpose not to defraud creditors, but to destroy evidence of criminal transaction, no excuse, § 2545.

Intent inferable from circumstances, § 2545.

Acts of similar nature, admissible in proof of intent, § 2546.

Bankrupt, a mere employee, omitting debts due relatives, § 2546.

Business man omitting debts due relatives, § 2546.

"Natural and probable consequences of act" presumed intended, § 2546.

Stupidity and ignorance of bankrupt, how far excuse, § 2546.

No special manner of keeping books requisite, § 2549.

Blaming bookkeeper, § 2549.

Merchant ignorant, but still with sufficient intelligence to know better, § 2549.

Partnership omitting an unusual purchase of goods, § 2549.

Omitting debts to relatives, §§ 2549, 2549½.

Thinking they would not be pressed, no excuse, §§ 2549, 2549½.

"False Oath."

As bar to discharge, § 2523.

DISCHARGE—Continued.

- Must be false oath or false account, § 2524.
- Oath must be authorized by statute and administered by one authorized, § 2525.
- Sufficient if administered either before testifying or afterwards, § 2526.
- Must be in or in relation to bankruptcy proceedings, § 2527.
- "False oaths" in poverty affidavits, § 2528.
- Omitting creditors from schedules, when, § 2542.
- Amendment after discovery of omissions, § 2543.
- In hearing upon petition for adjudication, § 2529.
- If not in, nor in relation to his own bankruptcy proceedings, no bar, § 2530.
- Whether in own previous bankruptcy proceedings, bar, § 2531.
- In bankruptcy proceedings under law of 1867 not sufficient, § 2532.
- Must have been material, § 2533.
- Material though subject is of little value, or exempt, or not recoverable, §§ 2534, 2535.
- That property could have been claimed as exempt, evidence toward negating intent, § 2539½.
- That property involved could not be recovered by creditors is evidence toward negating intent, § 2539½.
- That property of little value is evidence toward negating intent, § 2539½.
- Advice of counsel tends to negative fraudulent intent, §§ 2521, 2536.
- Frank disclosure to counsel requisite to negative, §§ 2521, 2536.
- Fraudulent intent not necessarily negated by fact that property not recoverable, § 2537.
- Nor that its value is unascertained, § 2538.
- Nor that it might have been claimed exempt, § 2539.
- False testimony on "general examination," "false oath," § 2541.
- After adjudication bringing suit to recover stock, omitted from schedules, § 2541.
- Bankrupt's rights to property dubious, evidence toward negating intent, § 2539½.
- Concealed merchandise omitted from schedules, § 2541.
- Corporate stock, omitting to schedule interest in, § 2541.
- Interest in decedent's estate, where bankrupt's rights doubtful or involved, omitted from schedules, § 2541.
- Must be "knowingly and fraudulently" made, § 2535.
- "False oath" whether same as "perjury," § 2535.
- Real estate equities placed in wife's name and never in bankrupt's own name, omitted from schedules, § 2541.
- Swearing to schedules containing misstatements or omissions, or false oath, § 2541.
- False statement in writing to obtain property on credit, as bar to discharge, § 2556.**
 - New ground, only available in bankruptcies instituted since amendment, § 2557.
 - Statement before amendment sufficient if proceedings instituted after amendment, § 2558.

DISCHARGE—Continued.

Whether other than particular creditor defrauded may oppose on this ground, § 2559.

First element "materially false statement in writing," § 2560.

Second element, must be by bankrupt, § 2562.

If made by agent with bankrupt's authority, sufficient, § 2563.

Third element; must be made to person from whom property obtained, § 2564.

Whether, if made to mercantile agencies, or in answer to general inquiries, a bar, § 2565.

Fourth element; property must be obtained on credit thereby, § 2566.

Fifth element; bankrupt must intend to obtain credit thereby, § 2567.

Whether intent must be to obtain particular property actually obtained, § 2568.

Sixth element; false statement must be relied on, § 2569.

"Continuing representations," § 2570.

Written statement need not be delivered if contents communicated, § 2661.

Agent making statement with bankrupt's authority, § 2563.

Partner's statement, § 2563.

Recklessness and carelessness in regard to agent's statement, raising presumption of connivance, § 2563.

Amendment of 1910, § 2565.

"Continuing representations," § 2570.

Elements of "materially false statement in writing," § 2560.

"False" means more than "untrue" or "incorrect," § 2560.

Basis of bar, moral turpitude, demonstrating general unfitness for commercial intercourse, § 2559.

Intentional deceit implied, § 2560.

Moral turpitude, whether involved, § 2467½.

Obtaining property on credit on, § 2556.

Property must be obtained on credit, § 2566.

"Money" borrowed on credit included, § 2566.

Recklessness, without honest belief in truth of statement, § 2560.

Releasing bankrupt from claims founded on false statement, whether estops creditor from opposing discharge, §§ 2460, 2556.

Releasing bankrupt from debts to cure statement, § 2556n.

Whether other than particular creditor defrauded may oppose on this ground, §§ 2462, 2559.

"Within four months," not necessary that statements have been made within, § 2570.

"Within four months" not necessary that property should have been obtained within, § 2566.

Unsuccessful opposition to discharge for false statement whether *res judicata* that debt not on false pretenses, § 2750¾.

Whether effect of false statement limited to immediate transaction, § 2570½.

Imputing acts of agents, partners, etc.,

Bookkeepers, acts of, whether imputable to bankrupt, § 2485.

DISCHARGE—Continued.

Partner, acts of, whether imputable to bankrupt, § 2485.

Fraudulent acts of agents and partners not imputable unless actual knowledge exists, where commission of "offense" is ground urged, § 2484.

Natural consequences of act presumed intended, § 2484.

Imputing acts of bookkeepers and partners, in false statements in writing, § 2484.

Presentation of "false claim or demand" against estate

A bar, § 2551.

Previous discharge within six years

Is bar to discharge, § 2571.

Whether present application be in involuntary or voluntary bankruptcy, immaterial, § 2572.

Previous discharge in involuntary proceedings, no bar, § 2573.

Previous discharge in voluntary proceedings is bar, § 1574.

Previous refusal within six years, not within bar, though res judicata as to old debts, § 2575.

Bar applicable where proceedings instituted after Amendment of 1903, though facts occurred beforehand, § 2576.

Measures time between first and second discharge, § 2577.

Does not measure time between first discharge and filing of second petition in bankruptcy, § 2577.

Nor between two adjudications of bankruptcy, § 2578.

Jurisdiction to administer estate unimpaired though discharge barred because of previous discharge within six years, § 2579.

Adjudication not vacated nor voluntary petition dismissed to aid bankrupt who discovers discharge barred, § 2579.

Referee's failure to properly publish notice of first meeting of creditors, no ground, § 2480.

Refusal to obey court's orders or to answer

As bar to discharge, § 2580.

Refusal to answer incriminating questions, § 2581.

Withholding discharge until court rules complied with, § 2582.

Transfer, removal or concealment within four months, as bar, § 2553.

Must be within four months preceding bankruptcy, § 2554.

Property need not be still recoverable, § 2555.

Preferences, whether constitutes, § 2553½.

Unless bankrupt commits one of acts prohibited his discharge "shall" be granted, § 2469.

Commission of crime of larceny against objecting creditors, before bankruptcy, § 2469.

"Recklessness," "improvidence" or "incompetence" in business affairs, § 2469.

Withholding discharge for bankrupt's contempt, § 2480.

Withholding discharge for non-compliance with rules of court, § 2478.

Granted though bankrupt owes nondischargeable debt, § 2470.

Granted though only debt scheduled be nondischargeable, § 2470.

Granted though opposing creditor's debt nondischargeable, § 2471.

Granted though opposing creditor's debt one against which no exemption exists, § 2471.

Withholding discharge for noncompliance with rules, § 2480.

DISCHARGE—Continued.

- Dismissing discharge for want of prosecution, § 2480.
- Temporarily holding discharge in abeyance, for "more thorough investigation," § 2480.
- Withholding until "proper accounting" given, § 2480.
- Withholding for correction of mistake as to exemptions, § 2480.
- Granted though only one debt exists, § 2472.
- Granted in individual bankruptcy though only partnership debts exist, § 2473.
- Insanity or death no bar, § 2474.
- Undetermined petition for discharge in pending bankruptcy under old law of 1867 no bar, § 2475.
- Whether misconduct in former bankruptcy a bar, § 2476.
- Lack of sufficient residence, domicile or principal place of business, no bar, § 2477.
- Filing of petition for discharge after expiration of year, § 2479.
- Filing of petition for discharge after expiration of eighteen months, § 2479.
- No refusal, for acts committed before passage of law, § 2482.
- Buying off opposition to discharge, § 2481.
- Fraudulent acts of agents and partners, when imputable to bankrupt, §§ 2484, 2485, 2563.
- Whether act must be committed in same capacity in which discharge sought, § 2486.

General nature of opposition

- Not criminal prosecution, and criminal law rules not applicable, §§ 2464, 2642.
- Refusal of discharge not imposition of penalty nor forfeiture, § 2465.
- No constitutional right to discharge, § 2466.
- Act liberal towards bankrupt as to discharge, § 2467.
- Right to discharge and effect of discharge distinct propositions, § 2468.

Procedure on

- In general, § 2447.
- Entry of appearance and filing of specifications, § 2448.
- Entry of appearance on time essential, § 2449.
- Appearance may be by attorney, § 2450.
- Entry of appearance gives ten days' time to file specifications, § 2451.
- Specifications to be filed in writing, § 2452.
- Not filed within ten days, dismissed, § 2453.
- Time extended but only for "good cause," § 2454.
- Bankrupt to attend hearing; no order necessary; no reimbursement of expenses, § 2455.
- Impeachment of witness by inherent improbability of own testimony, § 2650.
- Merely suspicious circumstances not sufficient where witness contradicted, § 2651.
- Mere evasive testimony and inability to account reasonably for assets not per se proof, § 2652.
- Though strong evidence tending to discredit, § 2653.
- Judicial cognizance of court records, § 2654.
- Res Judicata and Estoppel, § 2655.
- Discharge hearing not postponed to await outcome of fraudulent conveyance suit, § 2656.
- Declarations of alleged fraudulent transferrer, § 2657.

DISCHARGE—Continued.**Hearing of specifications**

- Special master to report findings of fact, § 2630.
- Special master to report conclusions of law, § 2631.
- Exceptions to special master's report and findings, § 2632.
- Court presumed to have investigated case on merits, on master's report, § 2633.
- Findings of fact not reversed except for clear error, § 2634.
- Final hearing on discharge to be before judge, § 2625.
- Certificate of conformity unauthorized, §§ 518½, 2428½, 2457, 2625.
- Judge may refer issues to special master, § 2626.
- Motions and demurrers, § 2627.
- Hearings before special master, § 2628.
- Whose duty to bring on hearing before special master, § 2628.
- Whether special master to exclude improper evidence, § 2629.
- Findings to be based on evidence introduced in opposition, not on facts known otherwise, § 2628.
- Whether special master to exclude improper evidence, § 2629.
- "General examination" of bankrupt admissible, § 2641.
- But must be introduced or stipulated in, § 2641.
- Presumptions of fact may shift again bankrupt and compel rebuttal, § 2636.
- Negligence of bookkeeper in omitting transactions with relatives, bankrupt required further to state circumstances of information given to bookkeeper, § 2636.
- Where "offense" charged, evidence to be "clear," "satisfying" or "convincing," § 2639.
- Proof aided by presumptions, § 2637½.
- "Natural" and "probable" consequences of act presumed intended, § 2637½.
- Fraudulent transfer decree, whether binding, § 2647½.
- Creditor's abandonment of further opposition, § 2628.
- Evasive testimony: credibility, § 2648.
- Evidence need not be beyond reasonable doubt, § 2638.
- Failure to produce material witnesses who are accessible, § 2646.
- Bookkeeper, where blamed for omission of entries of payments to relatives, § 2646.

Specifications in opposition to discharge

- "Certificate of conformity," none under present act, §§ 518½, 2428½, 2457, 2625.
- To be filed in writing, § 2452.
- Not filed within ten days dismissed, § 2453.
- Extension of time for filing, § 2454.
- Ten days time after appearance for filing, § 2379.
- Answer to specifications not necessary, § 2623.
- But answer may be filed, § 2624.
- Defective specifications, rights and remedies, § 2610.
- Specification of one ground, but proof of another, § 2611.
- Defective specifications waived by going to trial without objection, § 2612.
- Prosecuting objections in forma pauperis, § 2448.
- Time extended, even after expiration of original time, § 2454.
- Time extended, but only for "good cause," § 2454.

DISCHARGE—Continued.**Amendment of defective specifications, § 2613.**

Must be something in pleading whereby to amend, § 2614.

Amendment permissible after time limited for filing specifications, § 2615.

Even new ground of opposition may be added, § 2616.

Amendment to conform pleadings to proof, but not to set up entirely new ground after trial, § 2617.

Amendment may be ordered, § 2618.

Striking off specifications after amendment for failing still to show sufficient grounds, § 2619.

Amendment may be conditioned on payment of costs, § 2620.

Amendment may be refused, § 2621.

Refusal to permit amendment reviewable for abuse of discretion, § 2622.

Essential allegations and form of

Acts charged, to be brought within time limit, § 2598.

Distinct grounds may be joined in one specification, § 2599.

Each ground to be separately stated, § 2600.

All grounds need not be sustained, § 2601.

Specifications not to be used as "dragnet" or "fishing expedition," § 2602.

Must not be indefinite nor general nor argumentative, but certain and positive, § 2603.

Specifications are pleadings, § 2583.

Must show capacity of objecting creditor, § 2594.

All essential facts and elements of bar to discharge, to be alleged, § 2595.

"Knowingly and fraudulently" to be alleged where act charged is an "offense," § 2596.

If act charged is an "offense," must appear to have been committed after bankruptcy, etc., § 2597.

No greater definiteness necessary than nature of facts permits, § 2604.

Whether to be pleaded "with certainty of indictment" where "offense" charged, § 2605.

Evidence not to be pleaded, § 2606.

Legal conclusions not to be pleaded, § 2607.

Allegations in mere words of statute sufficient only where failure to keep books, ground charged—Elsewhere insufficient, § 2608.

Alternative allegations improper, § 2609.

All grounds need not be sustained—Discharge refused if any one sustained, § 2601.

Amendment refused where amendment tendered fails to state good cause, § 2621.

Capacity of objecting creditor, sufficient to allege interested as a creditor, § 2594.

Evidence not to be pleaded, but specifications not invalidated thereby, § 2606.

Verification and signature

Specifications are pleadings, § 2583.

To be verified, § 2584.

Lack of verification may be waived, § 2585.

DISCHARGE—Continued.

Lack of verification may be supplied by amendment, § 2586.

Where there are several objecting creditors, all may sign and verify same specifications, § 2587.

Whether, if several join in same, each must sign and verify, § 2588.

Whether verifications by some one with knowledge requisite, § 2589.

Verification by attorneys permitted, § 2590.

Forms of verification, § 2591.

Whether verification must be positive or may be on information and belief, § 2592.

Specifications to be signed, § 2593.

Amendment of, in sound discretion of court, § 2586.

Amendment of, one objecting creditor wholly failing to sign or verify at all, § 2586.

Form of verification—Precise wording need not be followed, § 2591.

Who may oppose discharge, § 2457.

Court itself not, § 2457.

Any "party in interest," § 2459.

Must have pecuniary interest, § 2460.

Need not have proved his claim nor have "provable claim," § 2461.

Whether other than one from whom property obtained by false representations may oppose on that ground, § 2462.

Whether objecting creditor's loss of capacity pending hearing compels dismissal of specifications, § 2463.

Creditors whose own specifications insufficient, using specifications of creditors who fail to appear, §§ 2463 $\frac{3}{4}$, 2481.

"Any party in interest"

Trustee competent by Amendment of 1910, §§ 571, 593 $\frac{1}{2}$, 898 $\frac{1}{2}$, 940 $\frac{3}{4}$, 940 $\frac{1}{2}$, 2458, 2459.

Object and effect of Amendment, § 940 $\frac{1}{4}$.

Trustee may, only when authorized by creditors, §§ 571, 593 $\frac{1}{2}$, 898 $\frac{1}{2}$, 941 $\frac{1}{4}$, 940 $\frac{1}{2}$.

Trustee, procedure where trustee is to object, § 2463 $\frac{1}{2}$.

Authorization by creditors, how creditors vote, § 2463 $\frac{1}{2}$.

Expense chargeable out of estate, § 2463 $\frac{1}{2}$.

Meeting of creditors, §§ 571, 593 $\frac{1}{2}$, 2463 $\frac{1}{2}$.

Notice to creditors, § 2463 $\frac{1}{2}$.

Court itself not, § 2457.

Contempt proceedings pending against bankrupt, discharge not granted until termination, § 2457.

Certificate of conformity, none required under present act, §§ 518 $\frac{1}{2}$, 2428 $\frac{1}{2}$, 2457, 2625.

Must have pecuniary interest, § 2460.

Assignee of a creditor's claim, purchasing for the purpose of opposition, § 2460.

Nondischargeable claim, whether sufficient, § 2460.

Releasing bankrupt from claims founded on false statement, whether estops creditor from opposing discharge, § 2460.

Partnership discharge

Partnership entitled to discharge, § 2791.

No individual discharge of member unless individually adjudged bankrupt, § 2792.

DISCHARGE—Continued.

Act of one bars firm discharge, if done within scope of partnership business, § 2793.

False statement in writing to obtain credit made by one partner, § 2793.

Firm debts to be mentioned, if discharge therefrom desired, § 2799.

Firm property to be described, if discharge from firm debts desired, § 2800.

Partnership debt, discharge of, in individual bankruptcy of a member

Rulings on, § 2794.

Individual liability for firm debts, discharged if firm debts "duly" scheduled in individual bankruptcy, irrespective of "firm assets," etc., § 2795.

Firm debts "provable" debts of each member, and so far as affect individual, are discharged by individual's discharge, § 2796.

Partnership debts to be "duly scheduled," else not affected by individual discharge, § 2797.

Notice to creditors must give notice of firm debts and that discharge therefrom sought, § 2798.

Petitions for adjudication and discharge each to mention firm debts and pray for discharge therefrom, § 2799.

Firm property to be described, § 2800.

Amendment to include discharge from firm debts, where already duly scheduled, § 2801.

Even after term at which discharge granted, § 2802.

Cancellation of judgment against partnership, none where individual partner alone in bankruptcy, § 2794.

Petition for discharge, § 2417.

Who may apply for, see "Discharge—Who May Apply for."

Dismissal of, §§ 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441.

For want of prosecution, § 2433.

By the bankrupt, § 2433.

None for failure to bring on hearing in opposition, § 2434.

None by bankrupt after hearing of specifications in opposition, § 2435.

In effect a judgment denying discharge, § 2436.

Even though for mere failure to file, § 2436.

Neglect of counsel no excuse, § 2436.

Order of dismissal to be entered, else not res judicata, § 2436.

Form of, § 2429.

Whether to be verified, § 2430.

Hearing of discharge petition

Judge to fix date, not referee, § 2430½.

Thirty days notice required by Amendment of 1910, §§ 565¼, 2431½.

Notice of, §§ 2431, 2432.

Ten days notice by mail, § 2431.

By publication, § 2432.

Where schedules give no addresses, § 2431.

Personal notice not essential to validity of discharge, § 19.

Second petition not maintainable after refusal of first, where debts identical, § 2437.

Creditors appearing in second bankruptcy, proving claims and examining bankrupt, no estoppel, § 2437.

DISCHARGE—Continued.

Debt provable in first bankruptcy put into judgment after expiration of time for applying for discharge, § 2437.

Refusal, "without prejudice to renewal of application" if pending litigation favorable to bankrupt, § 2437.

Second petition, where debts in subsequent bankruptcy partly same, partly new, discharge in first bankruptcy being refused, § 2438.

Discharge decree providing for exception of old claim, § 2438.

Intervening judgment on old debt, § 2438.

Time for filing of, § 2423.

After one month and before end of year from adjudication, § 2423.

Extension of time granted, § 2424.

Objections to must be made promptly, § 2424.

Filing objections to merits, waiver of objection to extension of time, § 2424.

To be applied for before expiration of time, § 2425.

Only because "unavoidably prevented," § 2426.

What constitutes "unavoidably prevented," § 2426.

"Nunc pro tunc" orders to cover laches improper, § 2426.

No jurisdiction to discharge on petition filed after eighteen months, § 2427.

Referee need not notify bankrupt to file, § 2428.

After one month and before end of year meaning "year and a day," § 2423.

No notice to creditors of application for extension of, requisite, § 2424.

No vacating of adjudication of bankruptcy to give jurisdiction, § 2427½.

May not evade limitation by filing new petition in bankruptcy for identical debts, § 2427½.

Where to be filed, § 2430¼.

Pleading and proof of

To be set up as defense, else waived, § 2682.

Res judicata

Erroneous judgment on debt, notwithstanding discharge duly pleaded and proved is res judicata until reversed, § 2687.

Cancellation of judgments discharged by bankruptcy, § 2687.

Former refusal of discharge is, as to all claims then provable, § 2680.

Refusal of discharge petition, "without prejudice to renewal of application" if pending litigation favorable to bankrupt, § 2437.

Second petition, debt provable in first bankruptcy put into judgment after expiration of time for applying for discharge, § 2437.

Second petition filed, creditors appearing, proving claims and examining bankrupt, no estoppel, § 2437.

Second petition, where debts in subsequent bankruptcy partly same, partly new, discharge in first bankruptcy being refused, § 2438.

Discharge decree providing for exception of old claim, § 2438.

Intervening judgment on old debt, § 2438.

Withdrawal of objection to discharge based on same fraud, not res judicata as to dischargeability of claim, § 2746.

Refusal of discharge under former bankruptcy act, not res judicata under present act, § 2439.

DISCHARGE—Continued.

Refusal of discharge under state bankruptcy or state insolvency law not res adjudicata as to same debt in federal bankruptcy, § 2440.

Refusal of discharge no bar to subsequent bankruptcy petitions nor adjudications, § 2441.

Unsuccessful opposition to discharge for false statement in writing whether res judicata that debt not on false pretenses, § 2750¾.

Discharge

Proving claim in bankruptcy not waiver of exception, § 2750½.

Revival of discharged debt

Discharged debt may be revived, § 2714.

No new consideration necessary, § 2715.

Part payment on account insufficient to revive debt, § 2716.

Discharge waivable by new promise, § 2717.

New promise not necessarily in writing, § 2718.

New promise to be more than mere acknowledgment of debt, § 2719.

Equivalent of promise to pay necessary, § 2719.

New promise to be certain, unequivocal and clear, § 2720.

New promise may be conditional, if definite, § 2721.

New promise after filing of petition and before discharge, sufficient, § 2722.

Acceptance of new promise requisite, § 2723.

Must be accepted in terms offered, § 2724.

Conditional promise accepted as offered, sufficient, § 2725.

Action on revived debt to be brought on original consideration, § 2726.

New promise not to be pleaded nor proved in first instance, § 2727.

Allegations, in pleading new promise, § 2728.

Revocation of discharge

Appeal and error, § 2897½.

Appeal, whether lies, § 2824½.

Grounds for

Fraud in procuring discharge, accompanied by grounds for barring it, sole ground, § 2813.

Buying off opposition, § 2814.

Applicant's knowledge of fraud at time of discharge granted, § 2815.

Applicant's laches, § 2815.

Ground for barring discharge itself must also exist, § 2816.

Creditor defeated in opposition to discharge may not move for revocation on same grounds, § 2817.

Vacating for irregularities not going to merits, § 2818.

Petition for must be in "Bankruptcy Court," § 2821¼.

Failure to receive notice, whether, § 2818n.

No vacating for irregularities unless reasons for refusal to grant discharge also exist, § 2818.

Jurisdiction, § 2806.

Pleading and practice

Petition, allegations of, § 2822.

Amendment of petition, § 2823.

Capacity of parties, § 2822.

Legal conclusions, § 2822.

Revocation to be applied for within year after discharge, § 2824.

Trial to be before Judge not before referee, § 2820.

Reference to special master, § 2821.

DISCHARGE—Continued.

Pleadings and practice on, whether applicable to setting aside of composition, § 2405.

Applicant's knowledge of fraud at time discharge granted, or laches, fatal to revocation, § 2815.

Examination of bankrupt not asked for, § 2815.

Previous abandonment of suit to set aside same fraudulent transfer, § 2815.

Who may ask for

"Parties in interest" alone, § 2807.

Includes creditor who has failed to prove claim within year, § 2808.

Must have been creditor at time of bankruptcy, § 2809.

Purchaser of discharged claim, not party in interest, § 2810.

Whether court sua sponte may within year vacate discharge not on merits, § 2811.

Whether bankrupt may move to vacate discharge, § 2812.

Bankrupt, in order to amend schedules to include omitted creditor where offset constitutes only asset, § 2812.

Creditor not scheduled nor notified, whether, § 2808.

Second petition for discharge

Not maintainable after refusal of first where debts identical, § 2437.

Where debts in subsequent bankruptcy partly same, partly new, and discharge in first bankruptcy refused, § 2438.

Refusal of discharge no bar to subsequent bankruptcy petitions nor adjudications, §§ 2441, 2579.

Staying of discharge

To permit creditor to perfect rights against surety or exempt property, § 2446.

Staying suits against bankrupt to permit interposition of discharge

In general, §§ 475, 1103, 1651.

Ipsa facto stayed till adjudication or dismissal of petition, § 2695.

After adjudication, further stayed, on application, until discharge heard, § 2696.

Application for requisite, § 2696.

Bankrupt has right to have suit stayed, § 2696.

After adjudication further stay discretionary, § 2698.

But assets of estate should be involved, § 2698.

Not only pending suits but also subsequent suits stayed, § 2697.

Comity requires request for stay first in court where action pending, § 2699.

Bankruptcy court may enjoin if necessary, § 2700.

Referee no jurisdiction to enjoin court or court officer, § 2701.

Whether debt sued on to be "clearly" shown to be within dischargeable class, § 2691.

Whether character of debt sued on to be determined from pleadings, § 2691.

Suits against bankrupt stayed until adjudication, § 2688.

Available to voluntary and involuntary bankrupt alike, § 2689.

Stay under § 11 for bankrupt's benefit, to permit interposition of discharge, § 2690.

Proceedings on nondischargeable debts stayable where creditors' rights involved, § 2692.

Error in holding claim dischargeable no warrant for disobedience, § 2693.

DISCHARGE—Continued.

- Stay applies to all incidents of proceedings in state court, § 2702.
- No further stay than for year, unless application for discharge filed within year not yet acted upon, § 2703.
- If discharge refused, court may render judgment in personam and judgment will be good, § 2705.
- If not interposed though granted, judgment valid, § 2706.
- Statutory cancellation of subsequently-rendered judgments, § 2707.
- No vacating of judgment rendered after discharge, for interposition of discharge, § 2708.
- Stay dissolved after discharge granted, or refused, or dismissed, § 2710.
- Qualified stay where levy sought on exempt property not exempt as to levy sought, § 2711.
- Where judgment necessary to perfect rights against surety, or property, § 2712.
- No deprivation of right of discharge by staying discharge hearing or refusing to stay creditor's suits where judgment requisite to perfect creditor's rights against sureties, etc., § 2713.
- Amendment of answer to set up discharge in behalf of surety, whether allowable, § 2712½.
- Contempt for disobedience of stay, § 2713½.
- Court of bankruptcy has exclusive jurisdiction, § 2698½.
- Debt dischargeable, else no stay, § 2691.
 - Obtaining money or goods by false pretenses, § 2691.
 - Order punishing bankrupt for contempt of state court, § 2691.
 - Supplementary proceedings for alimony, § 2691.
 - Supplementary proceedings on judgment for false imprisonment, § 2691.
- Proceedings on nondischargeable debts stayable, where creditor's rights involved, § 2692.
- Proceedings other than "suits" stayed, § 2694.
 - Supplementary proceedings in aid of execution, § 2694.
- Referee may issue stay, § 2700.
 - Duty to inquire into claim of nondischargeability, § 2700½.
- Statutory cancellation of judgments, § 2707.
- Stay only protects bankrupt from judgment in personam—Judgments in rem as to property unaffected, § 2709.
 - Foreclosure of mortgage, § 2709.
 - Garnishment of wages, § 2709.
 - Proceedings in rem against property, dependent upon obtaining judgment in personam, frustrated by discharge, § 2709.

Surrender of

- Bankrupt cannot voluntarily surrender discharge, § 2445.

Vacating of

- For irregularities not going to merits, § 2818.

Who may apply for

- Any person adjudged bankrupt, § 2418.
- Corporations, § 2419.
- Intervening insanity does not affect right to, §§ 98, 2420.
- Intervening death does not affect right to, §§ 98, 2421.
- No discharge of individual in partnership bankruptcy unless individual adjudication, § 2422.

DISCHARGE—Continued.**Withholding of**

To permit levy, §§ 1102, 2200.

No withholding of if exemptions good against levy, § 1105.

Staying of to permit creditor to take judgment, to fix liability on surety, § 1524.

Withholding of until sufficient accounting made, § 1852.

Withholding of to permit creditor to perfect priority rights, § 2200.

Withholding of until court's rules complied with, §§ 2480, 2582.

"DISCHARGEABILITY"

Different from "provability," § 633.

DISCHARGEABLE DEBT

Bankrupt protected from arrest on civil process issued upon, §§ 463, 464.

DISCHARGED DEBT

Revival of, see "Discharge—Revival of Discharged Debt."

DISCOUNTING OF NOTE

Of bankrupt, not a preference, § 1287.

DISCOVERING ASSETS

See "General Examination of Bankrupts and Witnesses."

Exhausting entire estate in attorneys' fees in effort to discover assets, § 2061.

DISCOVERY

Debtor to appear and also to produce books at time of trial when second and third acts of bankruptcy charged, § 179.

Query, whether requirement applies to receiverships as acts of bankruptcy, § 181.

Destruction or loss of adequate books no excuse, § 180.

Failure to keep adequate books no excuse, § 180.

Disjunctive allegations, § 256.

No statutory provision, §§ 181½, 282½, 412½.

DISCRETION OF COURT

Conducting of business within, § 387.

Granting stay of discharge to permit creditor to take judgment to fix liability on surety, § 1524.

Matters of discretion not reviewable unless abuse alleged, §§ 2942, 3011½.

Habeas corpus ad testificandum, issuance or quashing of writ, § 3011½.

Discretion of receiver in administration of estate, not to be controlled by actions in another court, §§ 1788½, 1806¼.

Nor by interference otherwise than by suit, § 1806½.

DISCRETION OF TRUSTEE

Abandonment of claims by trustee, § 933.

In administration of estate, not to be controlled by actions in another court, §§ 1788½, 1805, 1806¼.

In administration of estate, not to be controlled otherwise than by suit, § 1806½.

Trustee opposing discharge, § 940½.

DISMISSAL

Of appeal, for lack of necessary parties, § 2835.

Of "case" on completion of composition distribution, § 2397.

Of discharge petition for want of prosecution, § 2480.

Of discharge petition, see "Discharge—Petition for—Dismissal."

Notice to be given of, § 565.

No dismissal, if any petitioning creditor objects, § 422.

Of voluntary petition by court of its own motion, § 196.

Dispensing with trustee where no assets and no creditors present, § 871.

Of bankruptcy petition

After hearing merits, § 415.

As to part, § 416.

Costs on, after hearing merits, § 417.

Costs on dismissal where for want of jurisdiction, § 418.

Effect of on receivership, § 397.

Respondent allowed expenses, counsel fees and damages if seizure made, § 348.

Where property seized, improperly, same to be returned without deduction for care, § 347.

For want of jurisdiction, § 414.

No notice requisite, on dismissal after hearing merits, § 420.

Referee may dismiss petition, § 524.

Reinstatement on dismissal, without notice, § 421.

Ten days' notice to creditors to be given on, § 419.

No dismissal if any creditor is willing to take up contest, § 212.

Bad faith of petitioning creditors no ground for, § 333¼.

Collusion between petitioning creditors and bankrupt no ground for, § 333½.

Compensation of marshal or receiver under Amendment of 1910, § 358.

Where settlement made, and assets not "administered," § 358.

No authority to hear controversies after, § 422½.

Receiver's costs and expenses on, § 2039½.

Costs on, on settlements other than "compositions," § 418¾.

Motion to dismiss petition, § 422.

None because of collusive receivership, § 422.

None, if any petitioning creditor objects, § 422.

Notice of motion to dismiss, § 422.

Nunc pro tunc correction of order of dismissal, § 422.

Property provisionally seized to be returned without deduction for care, § 347.

Receivership expenses, whether payable out of assets, where no jurisdiction over bankrupt, § 398¼.

Settlement with all creditors, compensation of receiver on, § 398½.

Ten days notice to creditors, § 419.

Composition before adjudication

Amendment of 1910, § 416½.

Costs on, § 418½.

Not until terms of composition carried out, § 237½.

For want of jurisdiction, § 414.

Costs on, § 418.

Of "bankruptcy proceedings"

None by referee after adjudication, § 546.

Vacating of adjudication essential, § 524.

DISQUALIFICATION

Of part of petitioning creditors, § 237.

Whether judge disqualified for notifying authorities of probable commission of crime, § 2329 6/10.

DISREGARDING FICTION OF CORPORATE ENTITY

Also see "Ignoring Fiction of Corporate Entity."

Selling to "go-between" corporation, all but two shares belonging to bankrupt, § 1209.

DISSOLUTION OF CORPORATION

After commission of act but before petition filed, jurisdiction not defeated, § 97.

After filing of petition effects no abatement, § 101.

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Joint and several obligations for partnership debt, share in individual estate, § 2258.

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Individual debts "provable" against partnership both in partnership and in individual bankruptcy, § 2237.

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fraudulent intent, § 1209.

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Sales by receiver in State Court or by trustee in bankruptcy when competent as evidence of, § 1357.

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Circumstantial evidence, § 1406.

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To trustee's report of exempted property.

Who may except, § 1081.

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Creditors may except, § 1081.

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- Amendment of 1910 giving trustee rights of levying creditor, §§ 1025, 1034.
- Assets all exempt, yet trustee to be appointed, § 872.
- Bankrupt's attorney's fees, none allowable in contest over, § 2088.
- Bankrupt staying creditor pending hearing on discharge, § 1103.
- Bankrupt selling goods after filing of bankruptcy petition, amounts received deducted from exemptions, when, § 1093.
- Claim for, to give particular description, §§ 491, 1052.
- Commissions of trustee and receiver, whether any on exemptions, § 1093½.
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- Creditor attaching exempt property, whether "adverse claimant," § 1660.
- Creditor holding lien on both exempt and nonexempt property, whether to exhaust security on exempt property first, § 1885.
- Date of filing of petition fixes right to exemptions, § 1025.
- "Designation" of homestead exemptions after bankruptcy, § 1025.
- Death occurring after adjudication, exempted property passes to administrator, § 100.
- Duty of bankrupt to file claim of, § 477.
- Exempt property to be scheduled, §§ 490, 1050.
- Exempt property does not pass to trustee, § 1022.
- But if not claimed exempt, will pass, § 1022.
- Miscellaneous rulings on review of exemption matters, § 1111½.
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- Partner selling out share to enable remaining partner to claim exemptions, § 2271.
- Paying off liens on exempt property on eve of bankruptcy, no subrogation of trustee, § 2283.
- Permitting attachment to be levied, § 1107.
- Partnership between husband and wife becoming bankrupt, policy in favor of wife not exempt on husband's death, § 1003.
- Preferential transfer covering both exempt and nonexempt property, when set aside, whether revived as to exempt property, §§ 1033½, 1292.
- Qualified stay, where levy sought on exempt property not exempt as to levy sought, § 2711.
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- Requirements of state statutes for claiming, to be complied with, §§ 1041, 1047, 1048.
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- Right to, when bankrupt dies, § 99.
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Subjecting exempt property while in trustee's hands, by equitable action in State court, § 1106.

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Transfers or liens where property claimable as exempt but not claimed, § 1293.

"Ten per cent" of wages, not exempt, as against particular creditor, § 1102.

Wages earned subsequent to adjudication, whether come under prior levy, § 2678½.

Title to exempt property, none passes to trustee, § 1024.

Transfers of exempt property, whether preferences, § 1292.

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Valid liens on exempt property, not cast off by discharge in bankruptcy, § 1100.

Wages not exempt for certain per cent of claim, levy for, as to earnings after adjudication, §§ 451, 1102, 2678½.

Wife claiming where bankrupt fails to claim, § 1062.

Form of wife's claim, § 1062.

Withholding discharge to permit creditor to levy, where property not exempt as to him, §§ 1102, 1104, 2446.

Creditor must obtain stay of discharge, § 1104.

No withholding of discharge if exemptions good against levy, § 1105.

Amendment of claim of

Claim may be inserted or corrected, by amendment, § 1066.

Leave or order to amend requisite, § 1067.

Amendment required by court where exemptions claimed improperly, § 1068.

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Laches, refusal for, § 1070½.

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Amendment of claim allowed on reopening of estate on discovery of more assets, §§ 1066, 1069.

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"Appeal" not proper in exemption matters, § 1109.

Bankrupt not to be heard, not filing petition for review, on creditor's petition for review of order distributing exempt property, § 2834.

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Claiming of

Amendment, see "Exemptions—Amendment of Claim of."

Description to be as of date of adjudication, § 1053.

Claiming money when no actual money, but only goods in estate, § 1054.

Claiming so much worth out of a mass, § 1055.

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- Claiming "Proceeds" where property no longer in specie, § 1058.
- Estimated values to be given, § 1059.
- State Statute to be mentioned, § 1060.
- Claim to be made by bankrupt, not by mortgagee, assignee or other third person, § 1061.
- Wife claiming where bankrupt fails or refuses, to claim, §§ 1045, 1062.
- Failure to claim exemptions deemed, prima facie, waiver, § 1063.
- Failure to claim, not necessarily fatal, § 1064.
- Failure to describe particularly not necessarily fatal, § 1064.
- Failure to claim or describe caused by advice of counsel, § 1064.
- Claim of "proceeds" may authorize trustee to sell with remainder as entirety, § 1065.
- Time and manner of claiming and setting aside exemptions fixed by act itself, § 1048.
- But statutory regulations of state requisite to perfect claim must be complied with, §§ 1041, 1047, 1048.
- To be in writing, § 1049.
- Claim of exemptions to be sworn to, § 1049.
- Exempt property to be scheduled as assets elsewhere in schedule B as well as in schedule B 5, §§ 490, 1050.
- Claim to be filed with schedules, § 1051.
- Property to be particularly described, §§ 491, 1052.
- Forfeiture of, by fraudulent concealments, § 1098.
- Fraudulent transfer, whether claim of exemptions may validate, § 1061.
- Household goods purchased with wages of wife and children, § 1098.
- Extension of time for filing schedules, extends time for claiming exemptions, § 1051.
- Filing of declaration of homestead, required by State statute, § 1048.
- Itemization required by State statute, § 1048.
- Mortgaged property, exemption claimed in mortgaged property, § 1056.
- Nonbankrupt partner in partnership bankruptcy, § 1062½.
- Property to be particularly described, § 1052.
- Time and manner of claiming exemptions fixed by act itself, § 1048.
- Wife claiming where bankrupt fails or refuses to claim, § 1062.
- Description to be as of date of petition, § 1053.
- Withdrawal or abandonment of claim, §§ 1034, 1062¼, 1063½.

Jurisdiction of bankruptcy court over

- Court may enjoin interference with trustee's possession, § 1028.
- Is exclusive, § 1026.
- Court will not necessarily order surrender from bankrupt, § 1029.
- Court will not authorize trustee to intervene in attachment case to obtain possession, § 1030.
- After obtaining possession, no amendment of exemption claim to defeat lienholders as to whom property not exempt, § 1031.
- Bankruptcy court may not administer, § 1032.
- Bankruptcy court may only determine and set apart, § 1032.
- Bankruptcy court will not deliver to bankrupt simply because claimed exempt, if third party claims ownership, § 1033.
- Waiver of exemptions in notes, §§ 1034, 2679.
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- "Sales of merchandise in bulk," whether bankrupt entitled to exemptions out of unpaid purchase price, until creditors paid, § 1036.
- Exempt property not in possession not to be taken for benefit of parties as to whom not exempt, nor for benefit of lienholders, § 1037.
- Exempt property already set off not to be retaken for benefit of parties as to whom not exempt, § 1037.
- Claim of exemptions involved with conflicting claims of lienholders, § 1033½.
- May determine priority where involved in marshaling of liens, § 1033½.
- "No exemption against purchase price" does not include lender of money to make purchase, § 1035.
- Property not exempt as to "necessaries," § 1035.
- Effect of Amendment of 1910 upon, § 1035.
- Property not exempt as to "unpaid purchase price," § 1035.
- Effect of Amendment of 1910 upon, § 1035.
- Property not exempt as to "manual work and labor" claim, § 1035.
- Property not exempt as to judgments for torts, § 1035.
- Trustee entitled to possession long enough to set apart, § 1027.
- But no longer, § 1027.
- Mortgaging or assigning unselected exempt property, § 1033¾.
- Where property only partially exempt, § 1032.

Levying on

- Levying direct execution, after exempt property set apart, §§ 1108, 1915, 2679.
- No restraining order to prevent, § 1915.
- Levying on exempt property whether restrained for other purposes than for interposition of discharge, § 1910.
- Levying attachment or ordering surrender to sheriff holding writ, § 1107.
- Levying on exempt property before and after discharge, § 1102.
- Amendment of 1910, giving trustee rights of levying creditors, §§ 1025, 1034, 1102.
- "Ten per cent" of wages not exempt, §§ 451, 1102, 2678½.
- Qualified stay where levy sought on exempt property not exempt as to levy sought, § 2711.
- Stay necessary else subjecting of exempt property frustrated, § 2711.
- Withholding discharge to permit levy on exempt property, §§ 1102, 1104, 2446.
- No withholding of discharge if exemptions good against levy, § 1105.

Liens on

- Whether liens upon or other transfers of exempt property preferences, §§ 760½, 768, 1292.

Liens by legal proceedings upon exempt property within four months nullified, § 1447½.

- Property claimable as exempt, in schedules, subsequent waiver of exemptions ineffective, sheriff sale occurring meanwhile, § 1101.
- Property claimable as exempt but not claimed, levies nullified, § 1101.
- Whether nullified, §§ 1100, 1447½.
- Exempt wages, §§ 1100, 1447½.

Life insurance policies, §§ 1005, 1047.

- Exempt by State Law do not pass to trustee, § 1003.
- Exemptions on proceeds on death, does not exempt policy itself during life, § 1005.

EXEMPTIONS—Continued.**Preferential transfer**

Whether claim of exemption may validate, § 1061.

Property exempt, persons entitled, and law governing

State law of domicile governs, §§ 1038, 1041.

State law governs kind and amount and person entitled, § 1040.

State law as construed by highest state tribunal governs, § 1042.

But where decisions not authoritative or conflicting, bankruptcy court construes, § 1043.

Whether court of bankrupt's domicile may set apart homestead in real estate in another state having different homestead laws, § 1039.

May select in kind, regardless of impairment of remainder, § 1044.

Converting nonexempt property into exempt on eve of bankruptcy, § 1046.

Amendment of wages exemption law, § 1041.

Whether exemptions apply to all incidents of the property, § 1047.

Whether applies to crops growing on homestead, § 1047.

No double exemption, § 1047.

Various instances of exemptions allowed and disallowed in accordance with state law, § 1047.

Bankrupt heir, exemptions of decedent's estate, § 1047.

"Designation of homestead," § 1047.

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Failure to "act in perfect good faith," § 1047.

"Head of family," § 1047.

Husband living separate from wife, by mutual consent, not head of family, § 1047.

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Materially false statement in writing to obtain credit, whether valid objection to allowance of homestead exemptions, § 1047.

Partnership assets, exemptions from, § 1047.

Pension money, § 1047.

Purchase price, no exemption against, § 1047.

Time and manner of claiming and setting apart exemptions fixed by act itself, § 1048.

"Tools of business," § 1047.

"Wearing apparel," § 1047.

Wife claiming where bankrupt absconds or fails to claim, §§ 1045, 1047, 1062.

Bankruptcy court will take judicial notice of state law, § 1038.

Property not exempt as to "necessaries," "manual work and labor," "unpaid purchase price" or judgment for torts, § 1035.

Effect of Amendment of 1910 giving trustee rights of levying creditor, § 1035.

On recovery of preferences, fraudulent transfers, and nullified assignments, §§ 1094, 1095.

Whether allowable on recovery of preferences, §§ 1094, 1095.

Whether allowable on recovery of fraudulently transferred property, §§ 1094, 1096.

Whether allowable where general assignments nullified by bankruptcy, §§ 1094, 1097.

Forfeiting exemptions by fraudulent concealments or removals, § 1098.

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Laches barring additional exemptions out of newly-discovered assets, § 1094.

Whether creditors can complain of transfers on exempt property as being preferential or fraudulent, § 1093¾.

Review of

Allowance or refusal of, a question in "Proceedings in Bankruptcy" proper, § 2866.

Review under Section 24 (b) proper, § 1110.

No review unless trustee appointed, who has set apart, or refused to set apart, § 1110.

Of order disallowing exemptions, bankrupt taking no exception, but creditor taking exception, as to distribution of abandoned exemptions between creditors, § 1111½.

Setting apart of

Burden of proof, § 1085.

Order approving or disapproving trustee's report, *res judicata*, § 1086.

Pleadings necessary, § 1083.

Time limit for filing exceptions, § 1082.

Verification of exceptions, whether necessary, § 1084.

Judgment of state court as to exemptions in same fund *res judicata*, § 1087.

No second exemption out of same fund, § 1088.

Selling exemptions with other assets as entirety, and allowance out of proceeds, § 1089.

Trustee not entitled to indemnity before delivering exemptions, § 1090.

Trustee not to refuse to set apart until costs are paid, § 1091.

Bankrupt not entitled to reimbursement for care of exempt property pending setting off, §§ 1092, 2025.

Rent, storage and other charges pending setting off, § 1093.

No review unless trustee has set apart or refused to set apart, § 1111.

Trustee entitled to possession long enough to set apart exemptions, § 1027.

Bankruptcy court may set apart exemptions, § 1032.

Time and manner of, fixed by Bankruptcy Act itself, § 1048.

Governed by Bankruptcy Act itself, § 1072.

No demand to set apart requisite, § 1072½.

Trustee to set apart, §§ 919, 1073.

Must set aside "Soon as practicable" and within 20 days, § 1074.

Trustee's report to be itemized, with estimated value, § 1075.

Statutory method of bankruptcy act to be followed—no different manner proper, § 1076.

Not to set aside property not exempt by state law, § 1077.

Not to set aside property not claimed as exempt, § 1078.

Not bound to set aside claimed property if bankrupt not entitled to exemptions, § 1079.

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Trustee's duty to set apart exempted property, §§ 919, 1073.

Creditor must file exceptions within twenty days, § 1082.

Duty of trustee to give possession of exempt property, § 1074.

Exceptions to trustee's report setting apart to be verified, § 1084.

EXEMPTIONS—Continued.

Rent, storage and other charges pending setting off, § 1091.

Who may except to trustee's report of exempted property—bankrupt and creditors, § 1081.

Date of bankruptcy petition fixes right to exemptions, § 1025.

Grounds of exceptions, § 1082½.

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Exceptions to, §§ 1081, 1082, 1084.

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Filing additional grounds of objections after twenty days, § 1082.

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Tax no such "secured" claim as requires, § 2163.

Lien on both exempt and nonexempt property, whether to exhaust exempt property first, § 1885.

Two mortgages for same debt, one collateral, mortgagee to exhaust which, first, § 1885.

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Duty of trustee to close estate expeditiously, § 908.

EXPENSES AND COSTS OF SALES "CLEAR AND FREE" IN BANKRUPTCY

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EXPENSE OF PRESERVATION

Reimbursement of preferential transferee for, § 1770¾.

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Indemnity for, in instituting bankruptcy proceedings, §§ 286, 2130.

Respondent allowed, on dismissal, where property seized, § 348.

On sale free from liens, § 1989.

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Each fund to bear its own, § 1990.

First deducted, and liens paid out of remainder, § 1992.

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Proportionate part of, not to be charged against each lien, § 1991.

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Where bankrupt a "going concern," not "scrap" nor "wrecker's" value, § 1352.

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Market value as, § 1351.

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Dischargeability of, § 2754.

Judgment for, whether prevents inquiry in to original nature of obligation, § 2754.

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Immunity from use of bankrupt's testimony in proof of

Extent of immunity, § 2324.

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Liabilities for not discharged, § 2746.

Representations to mercantile agencies sufficient, § 2752.

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FALSE REPRESENTATIONS

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"FALSE STATEMENT IN WRITING"

Obtaining property on credit by, as bar to discharge, see "Discharge—Opposition to—Grounds of—False Statement in Writing to Obtain Credit."

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Bookkeepers, acts of, whether imputable to bankrupt, § 2485.

Made by one partner in scope of partnership business, bars firm discharge,
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Obtaining property on credit by, as bar to discharge, see "Discharge—Opposition to—Grounds of—False Statement in Writing to Obtain Credit."

Partner, acts of, whether imputable to bankrupt, §§ 2485, 2793.

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Exception of as affecting "Subject of Bankruptcies," § 30.

Excluded from operation of involuntary bankruptcy, § 46.

Exempt from involuntary bankruptcy though incidentally a storekeeper or attorney at law, etc., § 49.

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Though nonbankrupt partner be farmer, yet estate brought in, § 65.

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Exceptions, not mere matter of defense, § 244.

Natural person to be shown not to be a, § 243.

Negating of exceptions not necessarily by direct denial, § 245.

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Burden of proof of being engaged in, § 101½.

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Exception of, not mere matter of defense, § 244.

Natural person to be shown not to be engaged in, § 243.

Negating of exception not necessary by direct denial, § 245.

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In one petition, permissible, though acts be distinct, § 249.

Debtors who are not partners, joinder of as defendants to involuntary petition, § 305¼.

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Erroneously entered, notwithstanding discharge duly pleaded and proved, § 2687.

Fraud, judgment for any kind of, excepted from discharge, before Amendment of 1903, § 2747.

Fraudulent, may be attacked by trustee, § 1224.

Lien of judgment nullified by § 67 (f), nevertheless, judgment itself "allowable," § 777.

Means judgment lien, not judgment itself, when nullified by bankruptcy, § 1448.

None against trustee for excess of off-set, § 1187.

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Entry of within four months, upon award of arbitrators made before four months, § 1455.

Qualified judgment, on staying discharge, to fix liability on surety, § 1525.

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Rendered after adjudication, on attachment obtained before four months, § 1455.

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Res judicata of, on nature of liability, as to dischargeability, § 2754½.

Reverting of lien of, to "attesting of writ," § 1459.

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Not such merger as prevents inquiry into original character of obligation, §§ 2749, 2790.

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Not preference, unless creates lien, § 1282.

Non-dischargeable, nevertheless lien of, within four months, nullified by bankruptcy, § 1433.

Not requisite to nondischargeability, where property obtained by false pretenses, § 2748.

Original debt, not the judgment to be proved, where provable claim reduced to judgment after bankruptcy and before discharge, § 698.

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- "Same class," whether landlord in, § 1387.
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- Re-entry clause does not give, on proceeds of leasehold, § 992.
- Trustee of bankrupt tenant cannot perfect, §§ 992, 2201.
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LEASEHOLD**Bankrupt as landlord**

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Accept lease as assets, trustee not bound to, § 982.

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Landlord's claim under covenant to restore premises in "good condition," § 992.

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Occupied by receiver or trustee free of rent for any period for which landlord holds provable claim, § 992.

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Perfecting of landlord's lien, none by trustee of bankrupt tenant, § 992.

Mere re-entry gives no lien for future rent, on sale of, § 664.

Notice to quit served on receiver, § 986.

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Whether trustee bound to pay rent stipulated or only for use and occupation, § 985.

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Sale of, rights of purchaser and landlord as to arrears of rent, § 988.

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Assigning or subletting, covenants of forfeiture for, not violated by bankruptcy, §§ 964, 987.

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Forfeiture of, exercised by landlord after bankruptcy, § 986.

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General assignment preceding bankruptcy, effect of on right to forfeit leasehold for assignment, § 987.

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Leasehold liberated from forfeiture clause, § 988.

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Trustee takes, subject to forfeiture clauses, § 1151.

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Landlord forfeiting lease waives claim for unexpired term, § 665.

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See "Equitable Levy."

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Does not enlarge classes of provable debts, so as to include injuries to person, § 635.

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Dependent on local law as to title passing, § 967.

Liquor license on marshaling of liens, § 1885.

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Agreement for, not effective until within four months, § 1370.

Not appealable under § 25 (a), § 2900.

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Enforcement of, not barred by discharge of debtor, §§ 2668, 2673.

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Mere re-entry clause gives no lien for future rent, § 664.

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Tender of amount due, whether gives summary jurisdiction to order surrender, § 1826.

Lien, itself not a preference not to be denied validity, in marshaling, because preference on distinct transaction not surrendered, §§ 773, 1428, 1899.

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Consent of, not necessary on marshaling of liens, § 1886.

Consent of, not necessary for sale free from lien, §§ 1886, 1966, 1979.

Desiring to bid, may object to sale free from liens, before validity determined, § 1980.

Entitled to notice of sale free and clear from liens, § 1980.

Entitled to be paid in full if funds sufficient after deduction of expenses of sale, § 1992.

Liens by legal proceedings within four months, void only as to trustee, not as to other lienholders, § 1436.

Petition to redeem, whether gives summary jurisdiction, on tender, § 1826.

In possession, sale of securities by, not enjoined, § 1913.

In possession, after satisfaction of lien, subject to summary jurisdiction, § 1825.

As purchaser, may apply lien on price, § 1997.

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LIENS BY LEGAL PROCEEDINGS

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Artisans' liens are not, § 1158.

Between filing of petition and adjudication whether obtainable on bankrupt's property, § 1126.

Landlord's liens are not, § 1160.

Liverymen's liens are not, § 1157.

Mechanics' liens, etc., are not, § 1155.

Subcontractors' liens are not, § 1156.

Supplies, statutory lien for, § 1159.

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LIENS BY LEGAL PROCEEDINGS NULLIFIED BY BANKRUPTCY

Is second branch of trustees' peculiar title and rights conferred by the bankruptcy act, § 1429.

Bankruptcy court may, after adjudication, issue order for surrender, § 1474.

Basis of nullification, § 1462.

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LIENS BY LEGAL PROCEEDINGS NULLIFIED BY BANKRUPTCY—

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- Clause "f" applies to voluntary bankruptcies as well as to involuntary, § 1464.
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- Invalidating of lien relates back to inception of lien, §§ 1467, 1600.
- Judgments on provable debts rendered after bankruptcy but before discharge, § 699.
- Landlord's lien not, § 1160.
- Lien need not have created preference, § 1462.
- Lien absolutely void and falls of itself, § 1468.
- May come into court where lien obtained and ask for surrender, § 1471.
- Mechanics' liens not, §§ 1155, 1161.
- Nullification of liens by legal proceedings, §§ 1429, 1600.
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- Order of surrender, §§ 1474, 1601.
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 - Mere exchange of property or security, not, § 1320.
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 - If securities remain same but indebtedness secured increased by antecedent debts, preference as to antecedent indebtedness, § 1322.
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 - Withdrawal of old security and substitution of new must be contemporaneous, § 1324.
 - Payment of secured debt, thereby releasing securities, § 1325.
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 - Payment of secured debt, thereby releasing securities, § 1325.
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- Purchaser from bankrupt paying off bankrupt's debt to another creditor, § 1301¼.
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Intent of debtor to apply on debt requisite, § 1339.

Intent to apply on debt distinguished from intent to prefer, § 1340.

Bankrupt's deposit in bank, where no understanding for application on debt, not preference, § 1341.

Bankrupt's deposit in bank appropriated by bank, and applied on loan, § 1341.

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Elements of—"Greater percentage"

Must give creditor greater percentage than others of same class, § 1385.

If no net decrease of indebtedness during four months, no preference, § 1386.

Who are in "same class," § 1387.

Preferences among priority creditors, § 1388.

Actual receipt of like percentage by other creditors not essential to exoneration from charge of preference, if enough left, § 1389.

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But either actual receipt or actual benefit requisite, § 1392.

Firm and individual creditors belong to different classes, § 1387½.

Mode of proving "greater percentage," § 1390.

Settlements between bankrupt and creditors, arrangements to pay all creditors equal percentage, not preferences, § 1385.

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Insolvency of debtor requisite, § 1342.

Definition of insolvency under present act, § 1343.

Property fraudulently disposed of, not to be counted as assets, § 1344.

But equity of redemption counted, if fraudulent conveyance be by way of security, § 1345.

Property preferentially conveyed as security not to be excluded, § 1346.

Exempt property counted, § 1347.

Partnership not insolvent, unless all partners insolvent, § 1348.

Property to be taken at "fair valuation," § 1349.

"Fair valuation" not value at sacrifice sale, § 1350.

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"Fair valuation" of choses in action and intangible property, § 1353.

"Fair valuation," not what assets actually brought at trustee's sale, § 1350.

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Oral guaranties of bankrupt, whether included in determining insolvency, § 1366.

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- Transfer may itself create the insolvency, § 1344.
- Admissions of insolvency by bankrupt not competent against creditor, § 1354.
- Bankrupt's books admissible, § 1355.
- Schedules inadmissible against preferred creditor, § 1356.
- Inventory and appraisement in bankruptcy, whether admissible, § 1357.
- Whether sale by receiver in state court or by trustee in bankruptcy, competent, § 1358.
- Referee's allowance of claims, whether admissible, § 1359.
- Admissions of agent, as to insolvency of principal, § 1364.
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- Debts owing but not yet due included in bankrupt's liabilities, § 1365.
- Whether contingent liabilities counted in determining insolvency, § 1366.
- Adjudication of bankruptcy as res adjudicata on question of insolvency, §§ 445, 1362, 1364, 1776.
- Contingent liabilities, whether counted in determining insolvency, § 1366.
- Date of "insolvency" and "fair valuation," date immediately preceding transfer, § 1364.
- Date of insolvency and fair valuation, where recording necessary, § 1364½.
- Ordinary rules in proof of, § 1363.
- Bankrupt's general examination, whether admissible, § 1360½.
- Bankrupt as surety or guarantor, debt to be counted, § 1366½.

Elements of—"Reasonable cause of belief"

- Creditor must have had reasonable cause to believe preference would be effected, else preference not recoverable, § 1395.
- Existence of reasonable cause, question of fact, § 1396.
- Preferential transfer not necessarily fraudulent, § 1397.
- Sufficient if circumstances such as to raise inference of belief on creditor's part, § 1399.
- Reasonable cause for belief of insolvency requisite, § 1402.
- Also of all other elements of preference, § 1403.
- Reasonable cause for belief preference would be effected involves reasonable cause for belief that debtor was insolvent, §§ 1402, 1403.
- Agent's knowledge imputed to principal, § 1412.
- Except when agent acting for own interest, § 1413.
- Belief that preference would be effected may be presumed, § 1401.
- Burden of proofs, §§ 1403½, 1404.
- Burden of proof of each element of preference on trustee, § 1403½.
- Burden of proof—Transfer to relatives, § 1403½.
- Careful abstinence from making inquiries, § 1410.
- Cause for belief not necessarily that of person receiving—may be that of person benefitted, § 1411.
- Cause for belief [before Amendment of 1910] not simply that preference given, but intended, § 1400.
- Circumstances appearing suspicious after bankruptcy, which were not so before bankruptcy, § 1407.
- Creditor need not actually believe, § 1398.
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- Date of recording, date for existence of reasonable cause of belief, § 1410.

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- Debtor's intent immaterial by Amendment of 1910, § 1400.
- Endorsers and others secondarily liable having cause to believe, persons primarily liable not, § 1411½.
- Decisions negating existence of "reasonable cause of belief" under Act of 1867, additionally strong under Act of 1898, § 1396.
- Each partner deeding private residence to importunate creditor of firm, § 1396.
- Effect of Amendment of 1903, § 1394.
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- Failure to investigate no excuse where facts sufficient to put on inquiry, § 1409.
- Information must be concerning financial condition and property, § 1410.
- Instances indicating existence of "reasonable cause of belief," § 1396.
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- Intent of bankrupt to prefer, whether need be shown, § 1400.
- Lack of business experience, not sufficient to obviate, § 1398.
- Making proper inquiry, where facts sufficient to put on inquiry, § 1410.
- Mere cause to suspect debtor's insolvency not enough, § 1405.
- Mere giving of unusual security insufficient, § 1406.
- Mere nonpayment of claim long past due, or frequent duns or broken promises not sufficient, § 1407.
- Mortgage to bank withheld from record by agreement, etc., § 1396.
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- Rule charging creditor with knowledge must have reasonable construction, § 1410.
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- "Procuring or Suffering" judgment, § 1335.
- Warrants of attorney to confess judgment, continuing consents, § 1336.
- Debtor's voluntary action not implied in cases of preferences by way of judgments, § 1337.
- Payments of proceeds of execution sale to creditor sufficient without debtor's voluntary action, § 1338.
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- Amendment of 1910—Transfer consummated at date of recording, § 1334½.
- Bankrupt's deposit in bank, § 1341.
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- Debtor's voluntary action not implied in cases of preferences by way of judgments, § 1337.
- Embezzlements from bankrupt corporations, § 1333½.
- Escrow, instruments left in escrow, delivery within four months, preferences, § 1328.
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- Orders drawn by bankrupt on third person, accepted and assigned, § 1332.
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- Recording "not necessary," § 1334¼.
- "Transfer," consummation of, where recording "necessary," § 1334.
- "Transfer" includes, also, pledge, mortgage, gift, security, etc., § 1332.
- Conditional sales, not transfers, § 1334 1/10.
- Deposits in bank offset, § 1329½.

Elements of—"Within four months"

- "After-acquired property" taken possession of by mortgagee within four months, § 1371.
- Agreements for liens or for other transfers not effective until within four months, voidable, § 1370.
- Amendment of 1910 making date of recording date of proof of all elements, § 1379½.
- Assignment of accounts before, but collections within, "four months," § 1370½.
- Assignment of real estate mortgage, whether "required" to be recorded, § 1380.
- Deliveries within four months under contracts of purchase of entire season's output, § 1370.
- Equitable liens not requiring to be recorded, good, § 1372.
- Mere transmitting of actual possessions, within four months, after previous sufficient setting apart to constitute pledge, etc., § 1370.
- Must be obtained within four months, §§ 127, 1379.
- Preferences obtained before four months, not voidable, § 1368.
- Nature of limitation, § 1369.
- Agreements for liens not effective until within four months, voidable, § 1370.
- State law governs as to time agreements for liens, and taking of possession or recording take effect as liens or other transfers, § 1373.
- Mere exchange of property of equal value within four months, not preferences, § 1374.
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PRIORITIES UNDER STATE AND FEDERAL LAW, IN BANKRUPTCY DISTRIBUTION

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Landlord for use and occupation, not a priority creditor, § 2034.

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PROCEEDINGS IN REM

Bankruptcy proceedings are, § 18.

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Provisions as to service apply to partnership petitions filed by one partner, § 310.

Provisions as to service directory, not mandatory, § 309.

To be under seal and tested, § 1537.

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Debtor to appear and produce books at trial, to afford discovery, § 179.

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PRODUCTION OF BOOKS, PAPERS AND DOCUMENTS BY WITNESS

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Privilege as to incriminating evidence, §§ 1560, 1561.

Does not authorize refusal altogether to produce documents, § 1560.

To be claimed when book or document about to be inspected, § 1561.

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Given under compulsion, whether immunity from use lost, § 2323.

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Refusal of order for, whether appealable, § 2890.

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Waiving discharge by new, § 2717.

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And "allowance" different terms, § 595.

Degree of

On summary orders, must be "clear," "convincing," "satisfactory" or "beyond a reasonable doubt," § 1842.

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After expiration of year permissible, § 622.

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Changing legal nature of cause of action, § 619.

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After year, on surrender of preference, §§ 715, 716, 716½, 727¾, 737¾.

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Permissible after expiration of year for "proving" claims, § 622.

Original proof need not be formal, §§ 618, 715.

Assigned claims, §§ 608, 609, 610.

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Assignees' or receivers' compensation and expenses, on 'surrender of assets, § 1623.

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Caption and title, § 596.

Debts owing but not yet due, § 599.

Deposition for proof of claim prima facie case for claimant, § 844.

Judgments must be "proved" as well as other claims, § 676.

Transcript of judgment need not be attached, § 602.

Must state whether judgment taken, § 600.

Must state whether note given, § 601.

Claims against several bankrupts on same instrument, § 615.

Claims must be "duly proved," § 595.

"Claim" to be set forth and alleged to be "justly owing," § 597.

Consideration to be stated, § 603.

Different claims of one creditor need not be included in one proof, § 615.

Due date and interest, § 598.

Filing of, not necessarily "election of remedies," § 623.

Instrument in writing given, original to be attached, § 602.

On promissory notes, should state consideration, though importing consideration, § 603.

Surety, on payment, subrogated, pro tanto, to creditor's dividends, § 613.

By person contingently or secondarily liable, § 611.

Creditor not obliged to prove claim against bankrupt principal, even on surety's demand, §§ 612, 1515.

Right of surety or indorser to prove creditor's claim against bankrupt principal, § 1516.

Creditor entitled to prove against both principal and surety where both bankrupt, § 1519.

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Unless surety offers to indemnify creditor against expense, § 1518.

Priority claims, §§ 607, 2138, 2185.

For priority, requisite, except for taxes, § 2138.

Also except for government claims, § 2192.

Proving secured debt as unsecured, whether waiver or not, § 766.

To be in name of real party in interest, § 605.

Not requisite for government, § 2192.

Secured claims, § 606.

Signature, and verification, § 614.

Several claims by same creditor, § 615.

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Taxes need not be proved in form of other debts, §§ 702, 2161.

Unliquidated, original proof not necessarily formal, § 716.

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Withdrawal of, § 623.

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PROPERTY

Fraudulently transferred, see "Fraudulent Transfers."

Held on secret trust, see "Secret Trust."

PROPERTY FRAUDULENTLY CONVEYED, PASSES TO TRUSTEE, § 962.**PROPERTY NOT SCHEDULED**

Nevertheless passes to trustee, § 996.

PROPERTY PASSING AND NOT PASSING TO TRUSTEE

Kinds of, § 951.

Bonds pass, § 1001.

Claims against the government, § 1001½.

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Contracts to buy on future delivery pass when, § 1019.

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Child's property, see "Property Belonging to Bankrupt by Marital or Parental Right."

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Concealed property, see "Concealed Property."

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PROPERTY PASSING AND NOT PASSING TO TRUSTEE—Continued.

- Documents pass, § 954.
- “Documents” include books, deeds, instruments, papers, relating to business, § 955.
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- Distinct scope of each class, § 952.
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- False representation, right of action for, § 1019.
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- Fraudulently recommending a person as trustworthy, right of action for does not pass, § 1020.
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- Interests in wife’s property, see “Property Belonging to Bankrupt by Marital or Parental Right.”
- Inalienable property, see “Spendthrift Trusts and Restriction on Alienation.”
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- Libel, right of action for, whether, § 1020.
- Licenses to sell patented articles, § 958.
- Licenses to sell patented article, also see “License.”
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- Local law determines whether property within classification, § 953.**
 - Lease for ten years a chattel real not subject to chattel mortgage under New York law, § 953.
- Malicious attachment, right of action for does not pass, § 1020.
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- Malicious trespass, right of action for, does not pass, § 1020.
- Memberships in stock exchanges, clubs, etc., licenses and personal privileges, pass, § 967.
- Merchandise passes, § 1001.
- Mortgages pass, § 1001.
- Negligence of attorney, right of action for, does not pass, § 1020.
- Patents, copyrights and trademarks pass, § 958.
- Personal injury in accident, right of action for does not pass, § 1020.
- Powers, see “Powers.”
- Property rights must exist in bankrupt, § 970.
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PROPERTY PASSING AND NOT PASSING TO TRUSTEE—Continued.

Property held in trust by bankrupt, see "Property Held in Trust by Bankrupt."

Property fraudulently conveyed, see "Property Fraudulently Conveyed."

Property not scheduled, or concealed otherwise, passes, § 996.

Property transferable, or capable of subjection by legal process, passes, § 963.

If capable either of transfer or of being levied on, § 964.

Property transferable or capable of subjection by legal process, see "Property Transferable or Capable of Subjection by Legal Process."

Rewards, see "Rewards."

Reversionary interests, see "Vested Interests."

Rights of action on contracts, see "Rights of Action on Contracts."

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Torts for injury to person, rights of action for do not pass, § 1020.

Trustee's failure to sue gives no right to individual creditor to sue, § 996½.

Unpaid stock subscriptions, see "Unpaid Stock Subscriptions."

Unscheduled property, see "Unscheduled Property."

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Vested interests pass, § 972.

Uncompleted contracts involving personal skill or confidence

Contracts for future deliveries of personal property not dependent upon future personal dealing, § 994.

Wrongful attachment, right of action for passes, § 1019.

PROPERTY TRANSFERABLE OR CAPABLE OF SUBJECTION BY LEGAL PROCESS

Passes to trustee, § 963.

If transferable "by any means," or leviable upon, it passes, § 965.

If not transferable by any means or leviable upon, does not pass, § 965.

Compelling bankrupt to aid in effecting sale of renewal of liquor license, § 969.

Contracts for future deliveries, not dependent upon future personal dealing between original parties, § 994.

Exempt wages or salary, if not claimed as exempt, though earned under contract involving personal skill or confidence, § 994.

Government rewards not awarded until after bankruptcy of informer, though services performed before, §§ 969½, 970.

If capable either of transfer or of being levied on, § 964.

Elevator certificates outstanding, nevertheless grain in elevator passes, § 964.

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Licenses

Liquor license, § 967.

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To sell patented articles, § 967.

Memberships in stock exchanges, clubs, etc.

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PROPERTY TRANSFERABLE OR CAPABLE OF SUBJECTION BY LEGAL PROCESS—Continued.

No similar clause under act of 1867, § 963.

Passes though subject to contingency of election or of approval of public authorities, § 968.

Passes, though "transferable" only by peculiar and unusual means, § 969.

Precatory bequests in wills, § 970.

Property which bankrupt could have transferred but only in violation of law, not, § 963.

Property held in trust for bankrupt passes, § 973.

Property rights must exist in bankrupt, § 970.

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Uncompleted contracts involving personal skill or confidence

Wages or salary earned under, nevertheless pass, if not claimed exempt, § 994.

Unpaid stock subscriptions pass, § 976.

Vested interests pass, § 972.

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Of bona fide holders and purchasers, see "Bona Fide Holders or Purchasers."

PROTECTION OF BANKRUPT

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PROTECTION OF BANKRUPT FROM ARREST, § 463.

Arrest before bankruptcy, protection equally available, § 465.

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Arrest from other courts, whether within protection, § 469.

"Bankrupt" for purposes of protection, as long as any proceedings pending, § 473.

If debt dischargeable protected—otherwise not, § 464.

Duty of court to protect, § 466.

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"Adverse claimant" where he has already paid over proceeds to execution creditor, § 1477.

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"Adverse claimant," where he has already paid over proceeds to execution creditor, § 1477.

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Federal court bound by state court's construction of statutory law or right under state constitution, §§ 1043, 1141.

As to exemptions, § 1042.

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After-acquired property transferable at date of bankruptcy passes, though incident to property not passing to trustee, § 1131.

Liens by legal proceedings cannot be acquired after adjudication, § 1125.

Preference can not be acquired after adjudication, § 1378.

Does not pass to trustee, § 1130.

Liquor license, § 1130.

Wages earned under existing contract of employment, levy on, where certain per cent for necessities not exempt, § 451.

Status of property after filing of petition, and before adjudication

Filing of petition an assertion of jurisdiction, §§ 1119, 1807.

Title does not vest until trustee's qualification, § 1120.

Before trustee's qualification, title is in bankrupt, § 1120.

Date of cleavage, date of petition, §§ 1117, 1807.

Bankrupt quasi trustee until receiver or trustee appointed, §§ 383, 1121.

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Bankrupt not quasi trustee nor bailee for creditors before filing of petition, § 1121.

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Destruction of property meanwhile, § 1122.

Government reward awarded after filing of petition for services performed beforehand, § 1135.

Institution of suits by bankrupt meanwhile, § 1123½.

Liens given in meantime, whether subject to creditors right, § 1124.

Liens by legal proceedings cannot be acquired after adjudication, § 1125.

Liens by legal proceedings acquired between filing of petition and adjudication, §§ 1126, 1452, 1453.

Bankrupt retains dominion and power of disposal before adjudication unless receiver or marshal takes possession or injunction issues, § 1128.

Remedies of creditors holding securities meantime unimpaired, § 1129.

Preferences after filing petition and before adjudication possible, § 1377.

Summary order on bankrupt to surrender property, § 1818.

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Legal liens between filing of petition and adjudication

Suits, ipso facto, stayed, § 1126.

Title does not vest until trustee's qualification, § 1120.

Wages earned in meantime, § 1135.

Whether quasi bailee before adjudication, § 1121.

As successor to bankrupt's title and rights, § 1143.

After-acquired property, § 1152½.

Application of payments, § 1189.

Application to be as equity requires, in absence of directions, § 1191.

Application of payments, creditor's right to apply in absence of debtor's instructions, § 1190.

Application of securities to be made in accordance with contract, § 1191.

Artisans liens, § 1158.

Assignment of book accounts and notice to debtors, § 1147¾.

Bankrupt's contracts of purchase or sale, and his mortgages, § 1147.

Bankrupt's assumption of mortgage, § 1148.

Bankrupt's discharge not to affect trustee's right to recover property fraudulently transferred, § 2668½.

Bound by bankrupt's sales, mortgages, deliveries, bailments, contracts and equitable liens, § 1145.

Bound only in so far as creditor under state law bound thereby, § 1145.

Thus as to setting apart or delivery sufficient to pass title to goods sold, pledged or in process of manufacture; and warehousing, § 1146.

Goods pledged, § 1146.

Goods sold or manufactured, § 1146.

Goods sold for cash, delivered to buyer on promise to send check forthwith, § 1146.

Pretended change of possession, pledge not upheld, § 1146.

Certificate of stock, § 1147.

Claims against bankrupt stockbroker for moneys left for purchase of stock but wrongfully converted, §§ 783, 803.

Claim not proved within year, nevertheless available as offset, § 1172.

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- Conditional sales, § 1147.
- Creditors and trustee bound by bankrupt's contracts and acts, § 783.
- Creditor selling claim to effect indirect preference by purchaser using claim as offset to purchase price, § 1181.
- Creditor's right to make application in absence of debtor's instructions, § 1190.
- Disregarding note and suing on original consideration, § 1153.
- Dividend available as offset in favor of preferred creditor, § 1179½.
- Dower in lands located in another state, § 1166½.
- Inchoate dower right unimpaired by bankruptcy**, § 1166.
- Except where not good against levying or judgment creditors, § 1166¼.
- Estoppels against bankrupt, good against trustee, § 1149.
- Estoppel to deny authority of president to bind by lease, § 1149.
- Estoppel by retention of consideration, § 1149.
- Estoppel, see "Estoppels."
- Equitable lien, § 1150.
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- Goods on consignment, § 1147.
- Failure to perfect lien in statutory form invalidates, § 1162.
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- Forfeiture clauses, rent, etc., § 1151.
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- Intervention of creditors rights modifying, § 1144.
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- May plead abandonment, § 1201¼.
- May plead bankrupt's lack of capacity, § 1204.
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- May defend that chattel mortgage does not cover specific after-acquired property or is void for indefiniteness or for failure to comply with statutory requirements, § 1199.
- May enforce unpaid stock subscription, see "Unpaid Stock Subscription."
- May interpose bar of statute of limitations, § 1193.
- May redeem mortgaged property, § 1197.
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- May urge facts do not constitute pledge or other transfer, § 1206½.
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- May urge transfer absolute in form, but mortgage in fact, § 1200.
- May urge facts constitute sale**, § 1206.
 - Parol evidence to show what future advances intended, § 1206.
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- Mechanics' liens, etc., not liens obtained by legal proceedings nor preferences, § 1155.
- Nominal partnership, property held in name of, passes, § 964.
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- Offset, mutual demands must have existed, § 1171½.
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- Offset, voidable preference not available as in favor of preferred creditor, § 1179.
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- Pledges, § 1147.
- "Reputed Ownership" doctrine of, § 1147¾.
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- Trustee bound by bankrupt's assumption of debt, § 783.
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Votes cast by relatives, § 888.

Prior assignee or receiver as candidate, § 889.

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Votes cast for disqualified candidate not nullities, § 892.

Attempts to control trustee's administration by proceedings in other courts

Plaintiff in infringement of patent suit refused injunction upon trustee's paying out of funds, § 1910½.

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Order on trustee to account, not a prerequisite to suit on, § 877.

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Defendant in plenary action**Actions in personam for conversion, trespass or on contract, whilst carrying on trusteeship**

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Duties and powers of

Abandonment of worthless or burdensome assets, §§ 932, 1144½.

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To search out and pay taxes, § 703.

Subrogation of to creditor's lien in pending suit where lien preserved, § 1639.

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Where not substituted in pending suit bankrupt may continue prosecution, § 1644.

May plead bankrupt's lack of capacity, § 1204.

May sue state court officer for money had and received, where lien by legal proceeding nullified by bankruptcy, § 1476.

May interpose statute of limitations, § 1193.

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May sue creditors' committee for conversion of assets, § 1724½.

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- May plead accord and satisfaction, § 1202.
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- Actual improper influence, whether to be shown to invalidate, § 887.
- Allowance of claims may be postponed, § 864.
- Appointment by referee where objections to claims too numerous, §§ 579½, 870½.
- Approval and disapproval of creditors' election, § 878.
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- Court to appoint, how, where creditors fail altogether to act, § 870.
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Officer entitled to vote on his own claim, § 888.

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Prior assignee or receiver as candidate, § 889.

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Referee should not appoint either of opposing candidates, § 869.

Right of creditors to participate in, a substantial right, § 870½.

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Stockholder entitled to vote on his own claim, § 888.

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Commissions of, computed on disbursements for expenses, as well as on disbursements to creditors, § 2109.

In composition cases, how computed, § 2110.

Whether "disbursement" includes proceeds of property and trust funds surrendered to adverse claimants, and exempt property sold by trustee, § 2111.

Entitled even where outside agreement to "credit" exists and actual money does not pass, § 2112.

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Commissions on payments to lienholders, § 2109.

Commissions upon proceeds of property and trust funds surrendered to adverse claimants, § 2111.

In composition cases computed only on disbursements to creditors, § 2110.

Entitled even where outside agreement to "credit" exists and actual money does not pass, § 2112.

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Objections to claims by, or in name of

After trustee elected all objections to be by him or in his name, § 824.

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Refusing to object to a claim, trustee may be ordered, § 826.

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Entitled to all objections bankrupt might have urged, § 782.

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Creditors not to elect attorney for trustee, § 901.

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Liable for his attorney's misfeasance, § 903.

Trustee within summary jurisdiction of bankruptcy court, § 904.

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Enjoining suits in personam against, §§ 1781, 1782, 1911.

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Need not be sued in official capacity, but merely as individual, § 1784.

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None by dissatisfied litigant attempting indirectly to obtain review of referee's orders thereby, § 1788.

Subjecting dividends by equitable action in state court, no jurisdiction in state court to bring trustee before it for such purpose, § 2225.

May be surcharged for damage due to failure to pay taxes, § 703.

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Against creditor holding security, for an accounting, § 761.

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Refusing to sue, creditors may sue in trustee's name, § 1719.

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ULTRA VIRES CLAIMS

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Contingent claims not to be liquidated and proved, under § 63 (b), § 711.

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Liquidation of claims ex delicto not authorized unless presentable as on contract, § 710.

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- Liquidation of claims ex delicto not authorized, unless, § 710.
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- Patent infringement suit, plaintiff is refused injunction against trustee's paying out dividend until suit terminated, § 1910½.
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 - Whether, after trustee's recovery of preference, etc., in independent suit after expiration of year, defeated party's pleadings to be considered proofs filed within year, or litigation "a liquidation," §§ 716, 727½.
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None by inadvertent participation in election of trustee, § 576.

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WHO TO BE COUNTED

In determining number of creditors, for involuntary proceedings, see "Parties in Involuntary Proceedings."

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See "Widow's and Children's Allowances."

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None in bankrupt estate where death occurs after adjudication, §§ 100, 1167.

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Whether are "bankruptcy proceedings proper" or "controversies," § 2866.

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Is "adverse claimant" when, §§ 1664, 1822.

Claiming of exemptions by, where bankrupt husband neglects to claim, §§ 1045, 1062.

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General examination of bankrupt's wife, § 1527.

Inchoate dower of, not cut off by sale in bankruptcy without wife's consent, §§ 1973, 1974.

Support of, liabilities for not discharged, § 2757.

Liabilities to third parties not excepted from discharge, § 2759.

Confidential communications to, privileged, § 1566.

Delivery of money to husband by, presumptively a gift, § 1150.

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Dower of, selling "free and clear" from, § 1974.

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See "Four Months."

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Agent's admission not binding unless within scope of authority, §§ 559, 857.

Attendance of, where residing out of state, or further than hundred miles, § 1569.

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Agent's admissions not binding unless within scope, § 857.

Attendance of, where confined in prisons or in institutions, § 1568½.

Mere circumstances of suspicion, insufficient for rejection of uncontradicted testimony, § 555.

Sole testimony that of bankrupt or interested parties or relatives, § 555.

Conspiracy to defraud creditors, § 856¼.

Conviction of crime as affecting credibility, § 558¾.

Calling opposite party as witness, whether binds by testimony, §§ 1549, 1759.

Competency of, governed by United States statutes, not by state statutes, §§ 551, 1567.

Contempt for "willfully evasive" or "flagrantly false" testimony by, §§ 1568, 2331.

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Dealings between near relatives scrutinized with care, §§ 556, 854.

Defective execution of instruments, where no "creditor armed with process" exists, § 1240¾.

Discrediting even admissions against interest because witness such enormous liar, § 1850.

Entitled to attorney if also creditor or bankrupt, § 1574.

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Examiner, on general examination, to develop facts showing sufficient connection with bankrupt to make further inquiry relevant, § 1551.

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General examination of nonresident, § 1570.

Impeachment of, by inherent improbability of his testimony, § 2650.

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Mere circumstances of suspicion insufficient for rejection of uncontradicted testimony, §§ 555, 853, 2651.

Mere order upon, while on stand, to bring document, when disobedience of not contempt, § 1576.

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Great latitude in admission of evidence in cases where fraud claimed, § 856¾.

Ground of objection to be stated, § 552½.

"I don't know," or "I don't remember," repetitions of, §§ 558¾, 1568.

Omission of items from books, destruction of papers, etc., as badges of fraud, § 856½.

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Similar fraudulent transactions, § 856½.

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Unusual manner of conducting business, as badge of fraud, § 856¾.

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"Absolutely necessary for the preservation of the estate," § 384.

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"At any time," as applied to joining of additional petitioning creditors, § 213.

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"Chiefly engaged," § 48.

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"Continuing consent," § 136.

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- "Due scheduling," § 493.
- "Duly," § 2321.
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- "Election of remedies," § 623.
- "Equitable levy," §§ 1212, 1214.
- "Fair valuation," §§ 174, 1350, 1351.
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- "Final disposition," § 141.
- "Final judgment," § 717½.
- "Final settlement," of partnership, § 58.
- "Five days before sale," § 141.
- "Full faith and credit," § 2754.
- "In any form or guise," § 522½.
- "Innocent purchaser," § 1207.
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- "Moneyed business or commercial corporations," § 80.
- "Mutual debts," § 1203.
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- "Owing," § 673.
- "Preceding six months or greater portion thereof," § 34.
- "Pre-existing debt," § 1314.
- "Provable," §§ 697, 704.
- "Represent and warrant," § 694.
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- "Soon as practicable," § 1074.
- "Third person," § 1207.
- "Tillage of soil," § 50.
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- "Vacating" preference by legal proceedings, § 142.
- "Wages," § 2155.
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WORK

- Performance of in payment of debt, not a preference, §§ 1280, 1333.
- Performance of, not a "transfer," § 1333.

WORKING WITHOUT PAY

- While insolvent, whether "concealment of assets," § 2515.

WORKMEN

- See "Wages—Of Workmen, Clerks and Servants."

WRIT OF ERROR, § 2945.

- Decree in equity not reviewable by, § 2921.
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WRIT OF NE EXEAT, § 373.**"WRITTEN ADMISSION"**

Attorneys' fees not allowable to bankrupt for making, § 2088.

Corporation may make, §§ 44, 168.

Of inability to pay debts, etc., as acts of bankruptcy, see "Acts of Bankruptcy—Written Admissions of Inability to Pay Debts, etc., as."

Voluntary bankruptcy petition itself such an act of bankruptcy, §§ 73, 102, 164, 192.

WRITTEN INSTRUMENT

See "Instrument in Writing."

"WRITTEN STATEMENT"

False, whereby property obtained on credit, as bar to discharge, see "Discharge—Opposition to—Grounds of—False Statement to Obtain Property on Credit."

YEAR'S LIMITATION FOR FILING CLAIMS

Amendment of claim after expiration of year, §§ 734, 737¼.

But an original claim must exist filed within year, § 735.

Power of amendment not to be distorted to let in dilatory creditors who have withdrawn proofs, § 736.

Nor to let dilatory creditors filing claims against firm to file claims against separate partners, § 737.

Assignment of claim filed within year, but claim itself not filed, whether sufficient basis, §§ 715, 735, 744½.

Upon liquidation, §§ 714, 727¾.

On surrender of preference, § 737¼.

Appeal or review, year does not begin until date of entry of dismissal of appeal, § 719.

Applies also to secured claims as to deficit, § 728.

Applies though assets not distributed or new assets discovered, § 726.

Assigned after filing, § 742.

Not applicable to "claim" of assignee or receiver of state court, § 1614.

Not applicable to United States government, §§ 730, 2193.

Not applicable to taxes, §§ 730, 2162.

Applies though litigation pending, § 727.

Claim "allowed" after expiration of year, if filed within year, § 721.

Claims capable of liquidation but not liquidated, nevertheless discharged, § 732.

Claims presented after year stricken from files, § 724.

Composition cases, whether creditors in, bound by, § 2394.

Court's power absolutely ceases, § 723.

Despatch in administration, § 718.

Filing with trustee sufficient, § 729.

"Proving" means filing here, § 720.

Recovery of preference after expiration of year, whether defeated party's pleadings considered "proofs" filed within year, § 716.

Reopening of estate once closed, does not toll the limitation, § 2315.

Secured claim, limitation applies to deficit of, § 728.

Claims not proved within year

Nevertheless available as offsets, §§ 733, 1178.

Nevertheless dividend available as offset to preference recovered, § 1178.

YEAR'S LIMITATION FOR FILING CLAIMS—Continued.

Contingent claims becoming fixed within year, nevertheless not provable, § 641.

Dilatory creditors filing claims against firm, whether may, after year, file claims against separate partners, § 737.

Withdrawing claim from individual estate and filing against partnership estate, § 737.

Except where litigation be for liquidation, § 727¼.

Filing assignment of claim, but not claim itself within year, sufficient basis for amendment, §§ 715, 735, 744½.

Increasing claim or adding new claim, § 737½.

Limitation applies even where creditor not notified, etc., § 725.

Limitation applies even where creditor misled by erroneous statements of assets, § 725.

"Liquidation by litigation," terminating after expiration of, §§ 717, 727½.

Date of final judgment, § 717½.

Litigation over a preference or other transfer where claim would be reduced if creditor successful, §§ 716½, 727½.

Litigation over property in custody of bankruptcy court, sufficient filing, §§ 716½, 727¾.

May be "liquidated" after expiration of year, if "filed" within, § 722.

Original claim must exist, filed within year, else no "amendment," § 735.

Pleadings in independent suit for recovery of preference, whether to be considered proof, §§ 716, 727½.

Priority in distribution may be claimed after expiration of, § 722½.

If proof of debt itself filed within, § 2139.

Section 57. (n) does not enlarge classes of provable debts, §§ 719½, 737¾.

Subject of, involved in that of "provability of unliquidated claims," § 719½.

Unsuccessful attaching creditor, appealing from court to court, whether bound by, § 717.

Withdrawal of proof from individual estate and filing against firm estate, after expiration of year, § 623.

Withholding of dividend until expiration of year not required, §§ 731, 2214.

"Stricken from files" does not mean physical act, § 724.

